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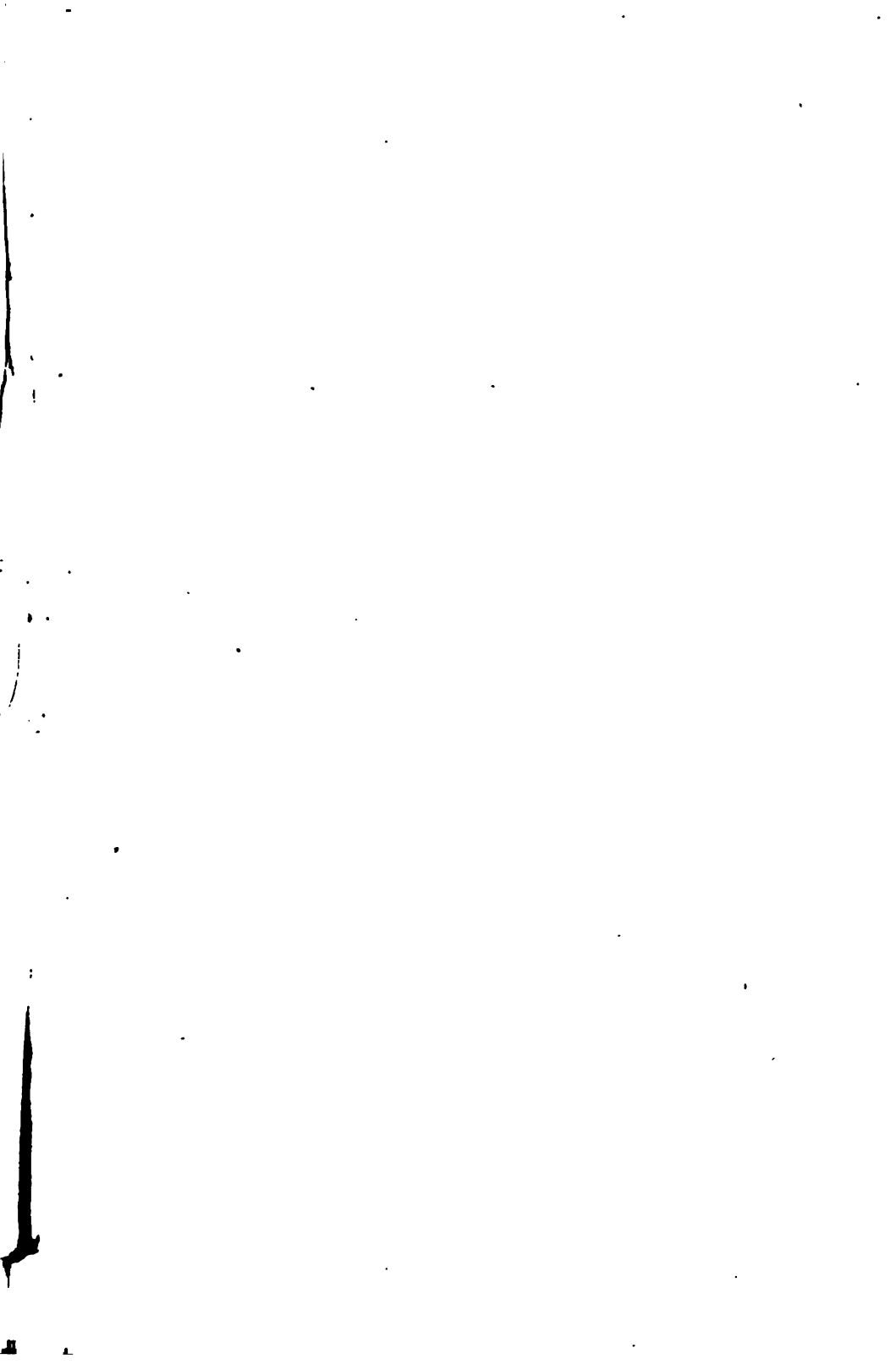
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OF

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ERRATA

Page 625, 3d syllabus, line 9, for § 4971-8 read § 4971-5

ERRORS NOTED IN PREVIOUS VOLUMES

Volume 78

Page 128, line 2 from bottom, for trustee read *cestui que trust*
Page 129, lines 2 and 3 from top, for *cestui que trust* read trustee
Page 129, line 3 from top, for trustee read *cestui que trust*

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Page 296, last syllabus, second line, for inferior read superior

RULES OF THE SUPREME COURT.

ADOPTED DECEMBER 30, 1914.

RULE VI.

It is Ordered that Rule VI of the Supreme Court of the State of Washington, pertaining to the number of abstracts, be so amended as to provide that, in every case in which an appeal has heretofore been taken or shall hereafter be taken, six copies of a legible typewritten abstract of the record, or thirteen copies of a printed abstract, where the same is printed, shall be filed with the Clerk of the Supreme Court along with the briefs of the party preparing the same. The abstracts to be as now provided by Rule VI.

N. B. For Rule VI, see 71 Wash. p. XL.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 11815. Department Two. August 1, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Pacific
American Fisheries et al., Plaintiff*, v. LESTER H.
DARWIN, *as State Fish Commissioner, Respondent.*¹

COURTS — JURISDICTION — APPELLATE COURTS — MANDAMUS OR INJUNCTION. Since the power to enjoin the performance of an act by a public officer is an attribute of a court of original jurisdiction and not of an appellate court, an original writ of mandamus will not be issued by the supreme court to define the duties of the fish commissioner in regard to the collection of license fees and dues for the benefit of the fund for the protection of fish, where the applicants for the writ were only indirectly interested in the collection of such fund by reason of their connection with the fish industry, and so far as they were directly interested, the relief sought against the collection of various fees claimed by the commissioner was injunctive rather than mandatory.

MANDAMUS—PARTIES—INTEREST OF RELATOR. Dealers in fish, cannermen, trap owners, lessees of traps, fishermen and others engaged in the fishing industry have no such specific interest, differing from that of the public at large, in the collection of the license fees and dues to be paid into the state fund for the protection and propagation of fish, as to entitle them to sue out a writ of mandamus compelling the fish commissioner to collect such fees and dues.

MANDAMUS—SUBJECT AND PURPOSES OF RELIEF—GENERAL ENFORCEMENT OF LAWS. Mandamus does not lie at the suit of private parties to enforce generally the laws relating to collection of fees and dues by the fish commissioner or to compel a general and continuing course of conduct, there being no complaint as to any specific act.

¹Reported in 142 Pac. 441.

MANDAMUS—SUBJECT AND PURPOSES OF RELIEF—DEFINING DUTIES OF OFFICER. Mandamus against the fish commissioner to define his duties will not be entertained although he desires the court to take cognizance of the application, since mandamus does not lie to define the duties of an executive officer.

Application filed in the supreme court January 23, 1914, for a writ of mandamus to compel the performance of duties by the state fish commissioner. Denied.

Kerr & McCord, for petitioners.

Frank W. Bizby, for respondent.

FULLERTON, J.—This is an original application for a writ of mandamus. The affidavit on which the application for the writ is founded, is as follows:

“E. S. McCord, being first duly sworn, on oath deposes and says:

“I. That he is a member of the firm of Kerr & McCord, attorneys for the petitioners above named; that he makes this affidavit and application for a writ of mandamus and prohibition for and on behalf of said petitioners.

“II. That Lester H. Darwin is now, and at all the times hereinafter mentioned has been, the duly appointed, qualified and acting fish commissioner of the state of Washington, and that said Lester H. Darwin, as such fish commissioner, is an officer of the state of Washington.

“III. That the petitioners are engaged in the catching, canning, salting, smoking, freezing and curing of fish caught within the waters of the state of Washington. That the Pacific American Fisheries, under the provisions of the laws of the state of Washington, operates a fish trap for the purpose of catching salmon and other food fishes within the waters of this state and sells and disposes of the fish so caught in its trap and fishing appliances to other parties; that it also operates a fish trap leased to it by the owner and holder of such fish trap or fishing location, held by such owner under a license issued to such owner by the fish commissioner of the state of Washington; that some of the fish caught at the trap owned by it and some of the fish caught by it at the trap which it has so leased it cans, salts, cures, and otherwise preserves; and some of said fish from such trap so operated and

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so leased it sells in the form in which they are taken from the trap to third parties.

"That the Pacific American Fisheries also purchases fish from other holders, owners and operators of trap locations and other fishing appliances, and a part of the same it cans and packs in its canneries operated in the state of Washington, and some of the fish so purchased it sells as fresh fish in the form in which they are purchased or caught in its trap or in the trap leased by it. That it also freezes and sells fish bought, or caught by it in its own trap or in its leased trap. That it also smokes, cures, salts and freezes and sells fish in such preserved form caught by it from its own trap and caught by it from its leased trap, and also sells in such preserved form fish purchased by it from the owners and operators of fish traps, and also sells in such preserved form fish caught by purse seiners and other operators of seines, and sold by such purse seiners and other operators of seines to it. That it also packs and cans in tin cans at its canneries fish bought by it from seiners and bought by it from trap owners and caught by it in its own trap, and caught by it in a trap leased to it, and that it buys fish from trap owners and seiners and sells the same to other cannerymen, who pack such fish so sold in tin cans at the canneries of such purchasers.

"That the Pacific American Fisheries pays the annual license fee for its trap location, and pays the license fee of one dollar per thousand upon all fish caught by it in its trap. That the owners of the fish trap leased also pay the license fee required by law for maintaining their trap, and also pay the license fee of one dollar per thousand upon all fish caught in said trap.

"IV. That the Swift-Arthur-Crosby Company operates a plant for preserving, freezing and selling fish in the state of Washington, and in addition to purchasing fish caught within the waters of the state of Washington, also purchases fish in the territory of Alaska and in British Columbia, and brings the same into the state of Washington and sells the same in the form in which they are brought in,—that is, in a frozen or iced condition. That the said Swift-Arthur-Crosby Company also brings in fish partially iced and preserves them in other forms and sells and disposes of the same in the state of Washington. That some of the fish handled by it are frozen in British Columbia or Alaska, and brought into the state of

Washington under its direction in a frozen form and sold in the same form. That it also acts as the agent of other parties in preserving, selling and disposing of salmon caught beyond the boundaries of the state of Washington and brought within the state of Washington; and acts as the agent of the owners of such salmon but is not otherwise interested in the salmon, except as agent; and that the persons for whom it acts as agent pay the license or tax for catching and preserving said salmon under the laws of Alaska, and also pay all the taxes or license fees of the state of Washington for which they are legally liable. That the petitioner in this paragraph named also buys, preserves and sells salmon and food fishes caught both within the state of Washington and in Alaska and sold by such takers of salmon to a third party and by such third party sold to this petitioner. In other words, this petitioner acts as a successive dealer in such fish after said fish have been once caught, bought by and sold to other parties.

"V. That your petitioners are interested as dealers in fish and as cannerymen, trap owners, lessees of traps, and seiners, and are interested in the conservation, protection and preservation of the fishing industry in the state of Washington. That the petitioner Swift-Arthur-Crosby Company is a citizen, resident and tax payer of the state of Washington, and that the Pacific American Fisheries is a corporation organized under the laws of the State of Maine and authorized to do business under the laws of the state of Washington and is the owner of property and a tax payer in the state of Washington, and is interested in the enforcement of the laws of the state of Washington regulating the fishing industry in all of its branches and is interested in causing to be collected and paid to the fish commissioner and thence covered into the treasury of the state of Washington all sums to which said fish commissioner and the state of Washington are legitimately entitled to receive from all parties engaged in the fishing business in any and all of its branches.

"VI. That the fishing industry of the state of Washington is regulated and controlled by the provisions of the laws of the state of Washington and that such provisions of the laws of the state of Washington provide for the collection of various license fees and charges which are intended by said laws to furnish a fund for the protection, propagation and expan-

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sion of the fishing industry and to furnish a revenue for the erection, construction and maintenance of fish hatcheries upon the various rivers of the state of Washington. That, in order that such fishing industry may be properly protected and maintained, it is necessary that all persons, firms and corporations liable for license fees should pay such fees promptly from time to time as they become due to the fish commissioner of the state of Washington. That the legislature of the state of Washington at its biennial sessions appropriates for the protection, regulation and preservation of the fishing industry and for the maintenance of its hatcheries large sums of moneys out of the state treasury, but that such appropriations are measured by the estimated amount of revenue that will be collected during the biennial period by the fish commissioner from the various licensees in the state of Washington who are engaged in the fishing industry.

"VII. That, if for any reason the fish commissioner should fail to collect the amount of the license fees to which he is entitled under the law, and the revenues thus collected by him be thus depreciated and diminished, then the general appropriation made by the legislature will be, according to precedent, reduced by the amount of such diminution or depreciation in the revenues so collected by the fish commissioner. That these petitioners, by reason of their interest as tax payers and by reason of their special interest in the fishing industry, and by reason of their interest in the preservation and protection of the same, and by reason of their interest in the maintenance of hatcheries, are specially interested in having the fish commissioner receive from all persons engaged in the fishing business in any and all of its branches the amount by way of license fees that they legitimately owe to the state of Washington or to said fish commissioner.

"VIII. That in the year 1899 the legislature of the state of Washington passed an act entitled: '*An Act providing for the protection and propagation of the food fishes in the waters of the state of Washington, regulating the catching and sale thereof, establishing licenses, fixing penalties, repealing conflicting laws, and declaring an emergency.*' That section 7 of said act is as follows:

"Every person, firm or corporation engaged in the business of buying, selling, packing and preserving or otherwise dealing in salmon, other than canners thereof, shall pay as

a license the sum of thirty cents per ton gross weight or in the round of said fishes bought and sold, packed or preserved, or otherwise dealt in: Provided, No person engaged in the business aforesaid shall pay less than \$2.50 per annum. It shall be the duty of each person, firm or corporation affected by the provisions of this section to render to the fish commissioner of the state of Washington, on or before the 10th day of each month, on blanks to be furnished by the said fish commissioner, a detailed statement, showing gross amount of fresh fish in the round bought and sold, packed and preserved, or otherwise dealt in during the preceding month, and each person shall pay to the said commissioner the amount due under the provisions hereof, on or before the 10th of each month, and a failure or neglect to do so shall constitute a misdemeanor, and upon conviction thereof the offender may be punished as hereinafter provided.'

"IX. That the legislature of the state of Washington at its session of 1905, amended said section 7 above set forth and that said section as amended at the legislative session of 1905 reads as follows:

"'Sec. 3. That section 7 of said act (being section 5270 of Pierce's Washington Code) be amended to read as follows. (Section 7, 5279.) Every person, firm or corporation engaged in the business of buying and selling, packing and preserving, or otherwise dealing in salmon, other than canners thereof, shall pay as a license the sum of ninety cents per ton net weight of said fish bought and sold packed or preserved, or otherwise dealt in: Provided, No person engaged in the business aforesaid shall pay less than \$2.50 per annum. It shall be the duty of each person, firm or corporation affected by the provisions of this section to render to the fish commissioner of the state of Washington, on or before the 10th day of each month, on blanks to be furnished by the fish commissioner, a detailed statement, showing net amount of fresh fish bought and sold, packed and preserved, or otherwise dealt in during the preceding month, and each person shall pay to the said commissioner the amount due under the provisions therefor, on or before the 10th of each month, and a failure or neglect to do so shall constitute a misdemeanor, and upon conviction thereof the offender may be punished as hereinafter provided.'

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"X. That the legislature of the state of Washington at its biennial session of 1907, amended said section 3 set forth in the preceding paragraph, so as to read as follows:

"Sec. 5. That section 3 of chapter 170, Session Laws of 1905 be amended to read as follows: Sec. 3. Every person, firm or corporation, either as principal, agent, or employee, engaged in the business of buying or selling, and preserving or otherwise dealing in salmon, other than canneries thereof, shall pay as a license the sum of ninety cents per ton net weight of said fish bought and sold, preserved or otherwise dealt in. Provided, No person engaged in the business aforesaid shall pay less than \$2.50 per annum. It shall be the duty of each person, firm or corporation affected by the provisions of this section to render to the fish commissioner of the state of Washington, on or before the tenth day of each month, on blanks to be furnished by the fish commissioner, a detailed statement showing net amount of fresh fish bought and sold, preserved or otherwise dealt in during the preceding month, and each person shall pay to the said commissioner the amount due under the provisions therefor on or before the tenth of each month, and a failure or neglect to do so shall constitute a misdemeanor and upon conviction thereof the offender may be punished as hereinafter provided.'

"That said section as adopted by the legislature of 1907 is also found at section 5213, 2 Rem. & Bal. Code of the state of Washington.

"XI. That the nature of the fishing business is such that unless the license fees owing to the fish commissioner or to the state of Washington by the various licensees and the various persons engaged in the fishing business are collected during or immediately subsequent to the expiration of the fishing season during which such license fees and obligations from such persons to the state of Washington mature, it will be impossible for the fish commissioner to collect the entire sum to which the state of Washington or the fish commissioner is entitled. That a vast number of persons are engaged in the catching, handling, selling and disposing of salmon, and that a considerable number of such persons have no fixed place of abode, and that unless a prompt collection of the amounts due shall be made by the fish commissioner, they will scatter, and it will be physically impossible for the fish commissioner to locate such parties in order to enforce

collection, and that the revenues of the fish commissioner will be very materially reduced and diminished on this account and that the fishing industry itself will be very materially damaged and injured unless the revenues to which the fish commissioner is entitled shall be collected.

"XII. That a serious doubt has arisen as to the proper interpretation and meaning of said section 5213, 2 Rem. & Bal. Code, and that it is the intention of the fish commissioner to bring against a vast number of people the necessary actions to collect the amount to which he claims to be entitled. That a vast multiplicity of actions and prosecutions will result if the fish commissioner attempts to maintain separate actions or prosecutions for the enforcement of said section 5213. That the petitioners in this action are interested specially and in a different way from the general public in having the fish commissioner collect the revenues to which he is entitled under a proper interpretation of said section, and that the fish commissioner is also vitally interested in the performance of his official duties in knowing the amount to which he is entitled under the provisions of the said section, and that both these petitioners and the fish commissioner are desirous of having said section properly interpreted by this court, that the public interests may be subserved, and that the fishing industry may be protected and preserved, and that the fish hatcheries of the state of Washington may be properly maintained, and that the fish commissioner as an official of the state of Washington may be enabled to execute the laws of the state of Washington relative to the fishing industry of which he is commissioner.

"XIII. That a number of uncertainties and ambiguities have arisen as to the proper interpretation of said section 5213; that in some instances these petitioners have refused to pay the license of ninety cents per ton provided for in said section, for the reason that they do not believe that the fish commissioner is entitled to collect the same; that various parties have refused to pay any portion of the license tax of ninety cents per ton provided for in said act, and that the fish commissioner has threatened to arrest a vast number of persons engaged in the fishing business, including petitioners and has threatened to seize their property under his view of the meaning and interpretation of said act. That such an attempt on the part of the fish commissioner would result

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in a multiplicity of actions and prosecutions, and that irreparable damage and injury will result, to the state of Washington, the petitioners and to the parties engaged in the fishing business should the fish commissioner carry out his threat of wholesale arrests, seizures and prosecutions.

"That the contentions of the fish commissioner with regard to the instances in which he is entitled to the ninety cents per ton provided for in section 5213 may be enumerated as follows: The fish commissioner contends:

"(1) That a person, whether a seiner or trap operator, who sells his catch in the same form as when taken from the water is liable for said tax.

"(2) That the owner of a cannery who leases a fish trap or fishing location or seine and catches fish with such appliances or any of them, and thereafter sells the same without otherwise preserving or dealing in said salmon so caught, is liable for the tax.

"(3) That a person who buys salmon caught by another party and salts, smokes, freezes, or otherwise preserves such salmon, is liable for the tax.

"(4) That a person who buys, sells, preserves, or otherwise deals in salmon within the state of Washington caught beyond the boundaries of the state of Washington, is liable for the tax.

"(5) That an agent who effects a sale of salmon within the state of Washington for a person, firm, or corporation catching such salmon, is liable for the tax.

"(6) That the successive dealers who buy, sell, preserve, or otherwise deal in said salmon within the state of Washington, other than canners thereof, are liable for the tax.

"(7) That persons engaged in the canning business who buy fresh salmon caught by other parties, irrespective of where caught, and sell the same within the state of Washington in the form in which they are caught, are liable for the tax.

"XIV. That if the contention of the fish commissioner is correct, many thousands of dollars of additional revenue will go into the treasury of the state for the benefit of the fishing industry. That if he fails to collect the amount which he claims, or the amount to which he is entitled, the interests of the fishing industry will be injured to that extent. That the fish commissioner ought to be required to collect all of the

tax provided in said section 5213 to which he is entitled, and that the fish commissioner, the fishing industry of the state of Washington itself, and all tax payers are interested in having the fish commissioner collect all of the revenue to which the state of Washington under said section is entitled.

"XV. That the fish commissioner, the respondent above named, has decided in his interpretation of said section that the persons engaged in those branches of the fishing industry enumerated in section 5213 are liable in each and every of the instances set forth in the preceding paragraph. That his interpretation of said act and his determination thereof is a quasi judicial determination, and that there is no appeal from his decision, and that if the said fish commissioner proceeds to enforce his decision by prosecutions, seizures and suits, irreparable injury will result to these petitioners and to all persons engaged in the branches of the fishing industry referred to in said section 5213.

"That the petitioners and such other persons engaged in the fishing business have no right of appeal from the judgment and decision of said fish commissioner, and have no other certain, speedy or adequate remedy at law, unless this court shall issue a writ of mandate compelling the fish commissioner to collect all of the tax to which he is entitled under the provisions of said section 5213, or unless a writ of injunction or prohibition issue restraining him from proceeding to enforce the collection of such taxes, or unless a writ of certiorari be issued, requiring the fish commissioner to make a return to this court showing the acts and things done by him, so that his action may be reviewed by this court.

"Wherefore, your petitioners pray this court that an order be entered requiring the respondent to show cause why he should not proceed to collect the ninety cents per ton tax provided for in section 5213, 2 Remington & Ballinger's Code in those instances specified therein, wherein said respondent claims he is entitled to collect the same, and to show cause why he should not be restrained and prohibited from collecting or attempting to collect and enforce the said tax in the instances specified in the foregoing petition, and that he be required to certify to this court the records and proceedings of his acts, wherein he had determined and decided that he is entitled to collect said tax in all the instances specified in the foregoing petition in which he claims he is

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entitled to collect said tax. And further, upon the hearing, that this court order and direct, by writ of mandate or otherwise, the said respondent to enforce the collection of such tax, in the instances specified in section 5213 in which the said fish commissioner is entitled to collect the same, and for such other general relief as your petitioners may be entitled to receive."

Notice of the time when the application would be presented to this court was served upon the fish commissioner, and that officer appeared at the time appointed and filed a general demurrer to the application. The application and the demurrer constitute the pleadings.

In our opinion the application presents no cause cognizable in this court in the first instance. One cannot read the affidavit filed in support of the application without the conviction that the relief sought is injunctive rather than mandatory. In so far as the applicants are directly interested, they seek to restrain the action of the commissioner, not to compel him to perform a specific duty. The power to enjoin the performance of an act by a public officer is an attribute of a court of original jurisdiction, it does not pertain to the duties of a court whose jurisdiction is revisory and appellate.

Again, if we were to concede that mandamus would lie under the circumstances, we think the applicants have shown no such special interest as is necessary to enable them to invoke the writ. Mandamus is a proceeding to compel the performance of an act which the law specially enjoins as a duty from an office, trust, or station, and can be invoked by a private party only where he is peculiarly and specially affected by the nonperformance of the duty. It does not lie at the instance of an individual to enforce the laws generally, or to compel a general course of official conduct. There must be some specific right of the applicant involved differing from that pertaining to the general public. Courts are not created to conduct the municipal affairs of government;

they can act only in specific cases. This question was before us in the case of *State ex rel. Hawes v. Brewer*, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. 858. In that case, the relator sought by mandamus to compel the sheriff to enforce the laws relating to the conduct of business on the first day of the week, commonly called Sunday. It was held that the writ would not lie, the court saying:

"Mandamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties. . . .

"The demand is for a continuing course of action. The writ cannot be any more specific than the petition, and the writ which must necessarily issue under a petition of this kind, and which was peremptorily issued, is no more effective than the statute. Each equally commands the officer to perform his duty. One is the announcement of the law by the law making power, the other is the announcement of the law by the court. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done. It is not adapted to cases calling for continuous action, varying according to circumstances. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

In the case before us, an examination of the affidavit of the relators will show that they do not ask for the performance of any specific act. The most they ask is that this court define the duties of the fish commissioner and compel him to perform them as thus defined. But, as we have attempted to show, this is not the province of any court, much less the province of a court of revisory and appellate jurisdiction.

It is said in argument that the fish commissioner himself is uncertain of his duties and desires the court to take cognizance of this application and define such duties. But such a practice would be contrary to the purposes for which courts are organized. If this particular officer may require this duty, so may all the other officers of the state, and thus the

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entire conduct of the executive department of the government be vested in the courts. The case in hand presents no unusual or extraordinary conditions. Like every other executive officer, the fish commissioner has the duty in the first instance of interpreting the statutes he is called upon to enforce. He must act according to his best lights without concern of those adversely affected by his acts. If he acts erroneously, those affected can be depended upon to find a remedy in the courts according to the usual and ordinary course of procedure.

The application is denied.

CROW, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 11501. Department One. August 4, 1914.]

NORTH AMERICAN LUMBER COMPANY, *Appellant*, v. THE
CITY OF BLAINE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—PROPERTY SUBJECT—LEASED HARBOR AREA. An assessment for benefits from a local improvement cannot be levied upon leasehold interests in harbor area leased by the state, in the absence of statutory authority therefor, the laws authorizing the levy of assessments on leasehold interests in tide lands not granting such right; hence the improvement will be enjoined.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered April 5, 1913, dismissing an action for an injunction, upon dissolving a temporary injunction. Reversed.

Walter B. Whitcomb, for appellant.

George D. Montfort, for respondents.

Crow, C. J.—Action by North American Lumber Company, a corporation, against the city of Blaine, its mayor, clerk, and councilmen, to enjoin them from entering into a

¹Reported in 142 Pac. 438.

contract for a street improvement. From a judgment of dismissal, plaintiff has appealed.

Appellant, a taxpayer in the city of Blaine, is the owner of platted tide lands and is a lessee of harbor area in the city of Blaine. Portions of the tide lands have been sold to appellant and other purchasers, and portions of the harbor area have been leased to appellant and other lessees. The city of Blaine holds a leasehold interest to a small portion of the harbor area, where it maintains a public wharf and dock near the outer harbor line. "E" street, which is platted over the tide lands, and which has been extended by city ordinance to the outer line of the harbor area, leads to the municipal wharf, and has been improved with an elevated roadway resting upon piling and other supports. This roadway is in such bad repair that the city has determined a new improvement is necessary. On June 20, 1913, the city council, by resolution, declared its intention to order the improvement of "E" street from the outer harbor line to the meander line, by piling, capping, laying stringers and planks and by constructing a wooden trestle and wharf. To pay the cost and expenses thereof, the resolution directed the creation of an enlarged assessment district and fixed its boundaries. This district, with other property, includes appellant's tide lands, appellant's leasehold of harbor area, tide lands and leaseholds of harbor area held by other parties, and also that portion of the harbor area held by the city as lessee. The resolution directed that \$10,000 of the cost of the improvement be assessed against that portion of the property located within the enlarged district between the termini of the improvement abutting on the street and extending back from the marginal line thereof to the middle of the abutting blocks, and that the remainder of the cost be assessed against the remainder of the enlarged district. No property was included in the enlarged district other than tide lands and leasehold interests on harbor area. Objections to the proposed improvement were filed by appellant and others, but later an

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ordinance providing for the improvement was passed in harmony with the terms of the resolution. This ordinance authorized advertising for bids. Before any bids were opened, appellant commenced this action, and upon notice procured a temporary injunction, which was dissolved when the action was dismissed.

The proceedings relating to the improvement contemplate that the entire cost shall be met by a special assessment on tide lands and leased harbor area, including the leasehold of a portion of the harbor area held by the city. Appellant contends that the only possible way in which the city's portion of such an assessment can be paid will be either by an appropriation out of the general fund, or by a foreclosure and sale of city property located within the harbor area. It further contends that no portion of the harbor area can be sold; that no assessment can be levied on any leasehold interest therein; and that payment of the city's proportion of the cost of the improvement, if made at all, must be made from its general fund. It is alleged and conceded that, when the resolution was passed, the city of Blaine was, and still is, indebted to the extent of \$25,000 over and above its constitutional limit, and appellant argues that, by making the improvement and directing an assessment on its leasehold estate in the harbor area, the city is about to incur further indebtedness, in violation of art. 8, § 6, of the state constitution, and that, by reason thereof, it should be enjoined from proceeding with the improvement.

In support of this contention, appellant cites *Powell v. Walla Walla*, 64 Wash. 582, 117 Pac. 389. In that case a district was created which included city property upon which a portion of the special assessment was to be levied. The city was indebted in excess of the constitutional limitation, and this court, in holding that it should be enjoined from proceeding with the improvement, said:

"It is stipulated that a material part of the cost of the improvement was assessed against property purchased by the

city for use as a city park, and it is stipulated also that the city of Walla Walla has reached the limit of indebtedness imposed on municipalities by the state constitution, and is without power to enter into a contract calling for the expenditure of money out of its general fund. These facts we think warrant the judgment entered by the trial court. The city cannot devote property purchased by it for use as a park to the improvement of a public street; hence, the attempted levy of an assessment thereon is invalid in so far as it seeks to bind the property. The attempted levy might be, under other circumstances, equivalent to an appropriation out of the city's general fund of the amount sought to be levied, but it cannot so operate here, as the city is without power to make such an appropriation. The effect is to leave this part of the cost of the improvement unprovided for; and such being the condition, it is within the province of a court of equity to restrain the letting of a contract for the making of the improvement."

It would seem that the principle thus announced is pertinent here and should be applied, unless the amount to be assessed against the city's leasehold upon the harbor area is so small as to require an application of the doctrine *de minimus non curat lex*.

Respondents, answering the complaint, alleged, and by evidence have proven, the fact to be that, after the temporary injunction had been granted, the city council by resolution appropriated \$200 from cash which it then had in a fund designated as "emergency fund" to pay the special assessment to be levied on its leasehold interest, in the event of a dissolution of the injunction. If the assessment were invalid as an additional liability in excess of the constitutional limitation, such an appropriation of money which should be used in discharging existing indebtedness would also be invalid. It appears from the evidence that the entire improvement will cost not less than \$12,000, but that the amount to be assessed against the city's leasehold estate upon the harbor area will approximate \$50. If the validity of this small proportion of the entire assessment were the only question involved, we might

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hesitate before enjoining the improvement; but a further question involving the validity of a much larger proportion is presented, and this we think is fatal to the proceeding.

The record shows that the city intends to levy a very considerable proportion of the cost of the improvement on leasehold estates held by private parties, on portions of the harbor area. Appellant contends that such assessment is without authority in law and cannot be made. Section 1, art. 15 of the state constitution prohibits any sale of harbor area. Section 2 of the same article directs that the legislature shall provide general laws for leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section 1, no lease to be for any term longer than thirty years. In *Spokane v. Security Sav. Soc.*, 46 Wash. 150, 89 Pac. 466, we said:

"In the absence of express statutory authority, the city could not subject lands of the state to a special assessment for local improvements. Authority therefor is not conferred by a statute which in general terms delegates power to the city to levy special assessments upon private property benefited by the improvement. 25 Am. & Eng. Ency. Law (2d ed.), pp. 1186-7. Hamilton, Law of Special Assessments, § 313."

Our attention has not been called to any act of the legislature authorizing a municipal corporation to levy such an assessment on a leasehold interest on any portion of the harbor area. The legislature, from time to time, has authorized special assessments to be levied on the leasehold interests held by private parties in and to tide lands owned by the state, where such leasehold interests were benefited by a special improvement. In *Trimble v. Seattle*, 64 Wash. 102, 116 Pac. 647, afterwards affirmed by the supreme court of the United States in *Trimble v. Seattle*, 231 U. S. 683, this court sustained such an assessment. It is manifest, however, that a statute authorizing an assessment on leasehold interests in tide lands cannot, by any known rule of construction,

be held to authorize an assessment on a leasehold interest in and to harbor area. We have been cited to no statute authorizing the levying of any special assessment upon a leasehold interest in harbor area, and need not discuss the question whether the legislature has authority to enact such a statute. The record, however, shows that a very considerable portion of the proposed assessment is to be thus levied to pay the cost of the special improvement now in contemplation. Applying the doctrine announced in *Powell v. Walla Walla*, *supra*, we conclude the trial court erred in dismissing the action.

The judgment is reversed, and the cause remanded with instructions to enjoin the improvement as proposed.

CHADWICK, ELLIS, and MAIN, JJ., concur.

[No. 12180. Department Two. August 4, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Richard Gowan, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

COUNTIES—COMMISSIONERS—TERM OF OFFICE—STATUTES—CONSTRUCTION—STARE DECISIS. Rem. & Bal. Code, §§ 3869, 3872, providing that, at the biennial election, one county commissioner shall be chosen for four years, does not violate Const., art. 6, § 8, providing that all elections for county officers shall be held biennially, where, for a period of twenty years, following a decision of the supreme court, one commissioner has been elected in each county for a term of four years at each biennial election, and the doctrine then announced and the interpretation placed upon the constitution have since that time been regarded as the law of this state.

Certiorari to review a judgment of the superior court for King county, Gilliam, J., entered July 20, 1914, dismissing an application for a writ of mandamus, upon overruling a demurrer to the answer. Affirmed.

¹Reported in 142 Pac. 452.

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Richard, Gowan, for relator.

John F. Murphy and *Samuel Morrison*, for respondent.

CROW, C. J.—Under the provisions of Rem. & Bal. Code, §§ 3869, 3872 (P. C. 115 §§ 239, 347), M. L. Hamilton, the present incumbent, was elected from district No. 2, in November, 1912, and later qualified, as county commissioner of King county for the four-year term ending in January, 1917. On July 13, 1914, the relator, Richard Gowan, who is an elector and resident of district No. 2, prepared and, for filing, offered to the auditor of King county, together with the legal filing fee, his declaration of candidacy for the office of county commissioner for that district, for the primary election to be held on September 8, 1914, so that if nominated he might be a candidate for such office at the general election to be held in November, 1914. The auditor declined this tender, and refused to file the declaration of candidacy. Thereupon, the relator applied to the superior court of King county for a writ of mandamus to compel the auditor to accept and file the declaration of candidacy. Answering the show cause order, the auditor pleaded the fact that M. L. Hamilton had been elected as county commissioner from district No. 2 at the November election in 1912, for the four-year term; that he had duly qualified, and that his term of office will not expire until 1917. To this affirmative answer, the relator interposed a demurrer, which was overruled by the trial judge. The relator refused to plead further, his application was dismissed, and he has brought the order of dismissal to this court for review by writ of certiorari.

The relator insists that the sections above cited, in so far as they provide that, at the biennial election, one commissioner shall be chosen for four years, are in violation of the constitution of the state of Washington; that no commissioner can be lawfully elected for a longer term than two years, and that a commissioner should therefore be elected this year from district No. 2. Relator concedes that his contention is

adverse to the decision of this court in *State ex rel. Hays v. Twichell*, 9 Wash. 530, 38 Pac. 134, where the identical question now presented was determined. He insists that the *Hays* case should be overruled, and makes an able argument in support of his position. That case was decided in October, 1894. For nearly twenty years, the doctrine there announced, and the interpretation then placed upon the constitution, have been recognized as the law of this state. One commissioner in each county of the state has since been elected for the term of four years at each biennial election. No action has been taken by the legislature to change the statute, and, upon due consideration of the questions presented, we, at this late date, decline to overrule the *Hays* case.

The judgment is affirmed.

MOUNT, FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 11794. Department One. August 8, 1914.]

O. F. SMITH *et al.*, *Respondents*, v. SCHADE BREWING
COMPANY, *Appellant*.¹

LANDLORD AND TENANT—LEASE—RENT—AGREEMENT FOR REDUCTION—CONSTRUCTION. Where a lease of a hotel for the term of five years provided for certain rentals to be paid in advance on the fifteenth of each month, and a subsequent agreement provided for a refund of a portion of such rent provided the same was paid in advance on the first of the month, and in event of delay in payment no refund would be made, the subsequent agreement was not a substitute for the lease so as to render it a lease for the reduced rental for the remainder of the term, but the reduction was in the nature of a gift, the benefit of which the lessee could obtain only by compliance with the terms of the agreement to make the payments promptly in advance on the first of the month.

SAME. Disallowance by the lessor of the amount of the agreed refund to the lessee, on failure of the lessee to make the payments promptly on the first of the month, would not amount to the imposition of a penalty, the agreement on the part of the lessor to make the refund being a mere concession.

¹Reported in 142 Pac. 455.

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Opinion Per Gose, J.

Appeal from a judgment of the superior court for Spokane county, Back, J., entered April 24, 1913, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Turner & Geraghty, for appellant.

V. T. Tustin, for respondents.

Gose, J.—This is an action to recover unpaid rent upon a written lease. There was a judgment for the plaintiffs. Defendant has appealed.

The facts are these: On the 6th day of August, 1908, the appellant leased from the respondents' grantor a hotel in the city of Spokane, the lease to become effective on the 15th day of August following. The term was five years, the agreed rental being \$650 per month for the first year, \$675 per month for the second year, \$700 per month for the third year, and \$800 per month for the remaining two years, the monthly rental to be paid in advance on the 15th day of each month. In October, 1909, the respondents purchased and have since owned the premises. On the 22d day of June, 1912, the appellant and the respondent O. F. Smith executed a written instrument which, after making appropriate references to the provisions of the lease and to the acquisition of title to the premises by the respondents, provides:

"Whereas, Owing to the hard times financially now existing in Spokane, the said O. F. Smith hereby promises to refund one hundred (\$100) dollars a month, during hard times, of the eight hundred (\$800) dollars a month, which under said lease the said Schade Brewing Company has contracted to pay as rent for said premises, it being distinctly understood between the parties referred to herein that the understanding as evidenced by this memorandum does not, and is not to be construed as in any way affecting the terms or conditions of said lease and in no wise to be construed as a modification of, or a substitution for said lease, but that the said lease shall remain and continue in full

force and effect; this memorandum being independent from said lease. It is further understood between the parties herein that the said Schade Brewing Company is to make its payments promptly each month in advance and without delay and on the first of each month, and in the event of such payments not being promptly made, the said O. F. Smith will not refund the said one hundred (\$100) dollars per month, as aforesaid, or any amount whatsoever of the said eight hundred (\$800) dollars a month as herein explained."

At the time the last instrument was signed, the appellant was in default in the payment of rent for the months of May and June, 1912. On the 5th day of July, the appellant paid the rental for May and June by two checks of \$700 each. On August 7, it paid \$700 by check for the July rental. On September 18, it paid \$700 by check for the August rental. On October 9, it paid the September and October rental by two checks of \$700 each. It defaulted in the payment of the rental for the months of November, December, and January. On January 3, it tendered the respondents \$2,100 in cash in full payment of the rental for those months, which the respondents declined to accept. They thereupon brought suit to recover back rental of \$100 per month for the period from May 1 to November 1, 1912, and \$800 per month for the months of November and December, 1912, and January, 1913. The court denied the respondents' claim for back rent, and allowed them \$800 per month as rental for the months of November and December, 1912, and January, 1913.

It will be observed that, under the terms of the lease, the rent was to be paid on the 15th day of the month. Under the later agreement, it was to be paid upon the first of the month. Appellant contends that, in view of that fact, the new agreement became a substitute for the lease and superseded it, so as to render it in effect a lease at \$700 per month for the remainder of the term. In urging this view, it overlooks its promise to make the payments "promptly

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each month in advance . . . on the first of each month, and in the event of such payments not being promptly made," that the owners would not make the refund. A reading of the later agreement makes it perfectly clear that the reduction of \$100 a month in the rent was in the nature of a gift which the respondents were prompted to make in virtue of the fact that times were hard. It may be conceded, however, that the promise to pay the rent on the first of the month, instead of on the 15th of the month, as provided in the lease, is a good consideration so long as the terms of the later agreement were complied with. But it is equally clear that the parties intended that, if the payments were not promptly made on the first of the month in advance, there would be no refund or reduction in the rent. In short, the appellant, in order to avail itself of the modified agreement, was required to comply with its terms. This it did not do.

The appellant argues that any rental in excess of \$700 per month is in the nature of a penalty and unenforceable. A penalty is a greater sum agreed to be paid to secure the payment of a lesser sum. This principle has no application here. In effect the respondents agreed to allow a rebate of \$100 a month in consideration of punctual payment each month in advance, and the agreement expressly provides that, if the payments are not so made, the refund will not be allowed. As the learned trial court observed, it is a concession and not a penalty. It is needless to pursue the question further. The appeal is wholly wanting in merit.

The judgment is affirmed.

Crow, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 11630. Department Two. August 10, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Pacific
Power & Light Company, Appellant*, v. PUBLIC
SERVICE COMMISSION *et al.*, *Respondents*.¹

APPEAL—DECISIONS REVIEWABLE—FINALITY OF ORDER OF PUBLIC SERVICE COMMISSION. Where, upon a hearing before the public service commission upon complaint against a water company, an order was entered requiring certain improvements to be made in the water system, and further directing that the defendant prepare and furnish detail plans for the improvements within a certain time, the same to be subject to the approval of the commission, etc., the order is not a final order giving the right of appeal therefrom; since all that is required of the defendant is the furnishing of plans for the improvements, after which the commission will be required to make such further order as it shall deem proper.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered August 2, 1913, confirming an order of the public service commission, upon review by writ of certiorari. Appeal dismissed.

Englehart & Rigg and *John A. Laing*, for appellant.

The Attorney General and *Stephen V. Carey*, Assistant, and *Guy O. Shumate*, for respondents.

MOUNT, J.—The respondents heretofore moved to dismiss this appeal on the ground that the superior court had no jurisdiction. We denied the motion upon that ground. 77 Wash. 1, 137 Pac. 302. The respondents now move to dismiss the appeal upon the ground that the order of the public service commission sought to be reviewed upon this appeal is not a final order. The appellant, in its reply brief, concedes that, if the order is not an appealable order, the motion should be granted. The same concession was made upon the oral argument.

¹Reported in 142 Pac. 431.

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We are satisfied that the order sought to be reviewed is not a final order, and that the motion should be sustained for that reason. It appears that, in the year 1912, a complaint was filed with the public service commission charging that the Pacific Power & Light Company, a public service corporation furnishing water to the city and citizens of North Yakima, was furnishing an inadequate supply of water, maintained an inadequate system, furnished impure water without sufficient pressure, and other things. A hearing was had before the public service commission, evidence was taken, and on the 26th day of March, 1913, the public service commission entered an order which consisted of two paragraphs. The first paragraph ordered the power and light company to make the following improvements in its water system: First, to remedy the leaky and defective condition of the wooden pipes in its distributing system within the city; second, to immediately discontinue the use of the present emergency reservoir; third, to construct a concrete storage reservoir at some convenient point in or near the city at a sufficient elevation to give a constant pressure of 85 pounds and with a capacity of fifteen million gallons; and fourth, to complete the lining, fluming, fencing, and other improvement on the Wapatox canal which were then under construction by the light and power company.

The second paragraph of the order is as follows:

"That said defendant be and it is hereby further directed, required and ordered to prepare complete detail plans for making the improvements set forth in paragraph one of this order and to submit said plans to this commission within 45 days from the date of the service upon it of the findings of fact and order in this cause, said plans to be subject to the approval of this commission and to such further order making changes or modifications therein, and fixing the time in which said improvements shall be completed, as this commission shall deem proper."

After this order had been entered, a motion was made by the power and light company for a rehearing. This motion

for rehearing was denied by the commission on April 22, 1913. In the order denying the motion, the commission states:

"That if the defendant company will file an application in proper form asking for an extension of the time mentioned in paragraph 2 of the order in said cause in which to prepare and submit plans for making said improvements, the commission will duly consider the same, and will grant such extensions of time as may be just and reasonable."

A writ of certiorari was sued out to review these orders in the superior court of Yakima county. That court confirmed the order of the commission. This appeal followed.

The *Attorney General* now argues that the order is not a final order requiring the light and power company to do anything except furnish plans and specifications for the improvements which it intends to make, and that, when these plans and specifications are furnished to the commission, as provided for by the order, that then the commission will be required to approve the same, or to order changes or modifications therein; that, if changes or modifications are made in the plans submitted, it will be necessary to take evidence and make a final order in the cause.

We are satisfied that the order above quoted is not final, except as it requires the light and power company to furnish plans and specifications for the work which it is proposed to do. Apparently the appellant makes no objection to this, for it conceded, upon the oral argument, that, if that was all it was required to do at this time, it had no objection to the action being dismissed. It is plain, we think, from the order above quoted, that that is all it is required to do, and that after these plans and specifications are furnished, an order will be made by the commission which seems to them reasonable and just, which will be a final order directing the power and light company to do certain specific acts in the improvement of their water system. Un-

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til that order is made, it seems clear to us that the order is not final.

The appeal will be dismissed for this reason.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11741. Department Two. August 10, 1914.]

KATHRYN A. POTTS, *Respondent*, v. CHARLES POTTS,
Appellant.¹

MARRIAGE—EVIDENCE—SUFFICIENCY. There is sufficient evidence to prove a ceremonial marriage, where plaintiff's testimony showed that she was regularly married to the defendant at the time and place stated, that she had lived with him for a period of eleven years, that he held her out as his wife during that time, had addressed letters to her as his wife, and that they had lived together as man and wife; such acts creating a presumption of marriage, although a common law marriage be held illegal.

CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—SURPRISE—DILIGENCE. It is not error to deny motions for a continuance and a new trial on the ground of surprise, caused by testimony of the plaintiff that a marriage was performed by a certain person at a certain place and time and in the presence of certain witnesses, where the allegations in the divorce complaint served upon defendant charged him with notice that such testimony would be given, and he failed to exercise his right to obtain further knowledge of the matters alleged by propounding interrogatories under Rem. & Bal. Code, §§ 1226, 1227, or to have the complaint made more specific in that respect, such neglect amounting to a lack of due diligence on his part.

DIVORCE—GROUNDS—ABANDONMENT—CRUELTY. A divorce will be granted on the ground of abandonment and cruelty, where it appears that the defendant abandoned the plaintiff and did not intend to live with her any more, that he had refused to furnish the necessities of life, and had been cruel and abusive, and such conduct was admitted by the defendant.

¹Reported in 142 Pac. 448.

Appeal from a judgment of the superior court for Klickitat county, Darch, J., entered June 9, 1913, upon findings in favor of the plaintiff, in an action for divorce. Affirmed.

Edward A. Davis, for appellant.

N. B. Brooks and *W. B. Presby*, for respondent.

MOUNT, J.—Action for divorce on the grounds of desertion and cruelty. Upon the trial of the case to the court below, a decree was entered in favor of the plaintiff. The defendant has appealed.

The appellant argues that the court erred, first, in denying the appellant's motion for a continuance at the close of the testimony; second, in entering a decree in favor of the plaintiff; and third, in denying the appellant's motion for a new trial.

In her amended complaint, the plaintiff alleged that she was married to the defendant on or about the 2d day of November, 1901, at Viola, in the state of Wisconsin. Three separate causes of action were alleged: first, the abandonment of the plaintiff; second, cruel treatment; and third, failure to support. The answer of the defendant was, in effect, a general denial.

When the case came on for trial, the plaintiff, without objection, testified that she was married to the defendant in Viola, Wisconsin, on the 2d day of November, 1901. She also testified that the marriage was performed by a minister at his residence in the presence of two witnesses; that, at the time of the marriage, the minister gave to her husband a certificate, or a piece of paper, which she did not read. She also testified to the fact of abandonment of her by the defendant after they had lived together for a period of about eleven years, to certain acts of cruelty, and to his failure to support. She also introduced in evidence certain letters which were written to her by the defendant, in which he addressed her as his wife, and signed the letters as "her loving

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husband." She also introduced a letter written by her husband to her in which he, among other things, said:

"You say Mrs. Crook is telling around that you are not married and had to do so and so, and the best thing I can say for you to do is to keep as still as possible . . . I wish we had never let your folks know of it for we could have kept it a secret a few months longer . . . and so if any one asks you for proof of your marriage you must not tell them anything more about it and they can't find out only from me as I have the certificate in my possession and I am going to keep it."

The plaintiff also testified that she had signed numerous deeds at the request of her husband in which she acknowledged herself as his wife. At the close of the plaintiff's evidence, the defendant asked for a continuance upon the ground that he was surprised at the statement of the plaintiff to the effect that they were married at a certain time and place in the presence of certain witnesses by a minister named. This motion was denied. After a judgment had been entered, a motion for a new trial was made upon the ground of surprise. Defendant filed affidavits by the named minister and witnesses, to the effect that the ceremony had not been performed as stated by the plaintiff, and that the witnesses were not present and did not know of the marriage. This motion for new trial was denied.

The argument upon this appeal is based wholly upon the rulings of the court in denying the continuance, as above stated, and in refusing to grant a new trial. The statute, Rem. & Bal. Code, § 322 (P. C. 81 § 555), provides:

"A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it . . ."

Section 399 (P. C. 81 § 729) provides, that a new trial may be granted for accident or surprise which ordinary prudence could not have guarded against. The trial court was

evidently of the opinion that ordinary prudence and diligence in procuring this evidence before the trial had not been exercised by the appellant, and for that reason denied the motion for a continuance and the motion for a new trial. We think the trial court was clearly right in so ruling. The complaint, as we have seen, alleged that the marriage occurred at a certain time and place. The appellant in his answer denied this allegation. His whole defense upon the trial was that he had never been married to the respondent. The evidence on the part of the respondent showed that she was regularly married to the appellant at the time and place stated, and that she had lived with him for a period of eleven years; that during all that time he had held her out as his wife, had addressed letters to her as his wife, had introduced her to his friends and relatives as his wife, and that they had lived together as man and wife. This was clearly sufficient to prove that a ceremonial marriage had been performed. In *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812, we said:

"It is well established law, not necessitating the citation of authority, that the proof of continual cohabitation of a man and woman, and of a continual assertion that the marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raises the presumption, in those states where the common law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned."

In *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84, we held to the same effect. Under the rule in this state, the evidence on the part of the respondent was sufficient to show a ceremonial marriage.

But the appellant insists that he was taken by surprise which ordinary prudence and diligence could not have guarded against, when the respondent testified that the marriage was performed by certain persons in the state of Wisconsin at a certain time, in the presence of certain witnesses.

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It is plain, we think, that the appellant, when the complaint was served upon him, was informed thereby, and was bound to take notice, that the respondent would testify that the marriage occurred at the time and place therein stated. If he desired to know who performed the ceremony and who the witnesses were who were present, if he in fact did not know, and if he in fact was not married to the respondent, it was his privilege as well as his right, under the statute (Rem. & Bal. Code, §§ 1226, 1227; P. C. 81 §§ 1071, 1073), to propound interrogatories to her and have her answer who performed the ceremony, and who the witnesses were. His neglect to propound these interrogatories and obtain answers thereto, or to have the complaint made more specific in that respect, was such neglect as would authorize the court, upon the trial of the case, to say there was lack of due diligence and no occasion for accident or surprise, and therefore to deny his motion for a continuance and his motion for a new trial.

While the appellant makes an assignment to the effect that the court erred in entering the decree, this assignment is not argued in the brief. The evidence is overwhelming—in fact, it is admitted—that he had abandoned the respondent and did not intend to live with her any more. He had refused to furnish her the necessities of life, and he had been cruel and abusive to her. Upon his own statements, the court was justified in entering a decree upon the evidence in the record.

The judgment appealed from is therefore affirmed.

Crow, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 11752. Department One. August 10, 1914.]

FRANK NETTLETON *et al.*, Appellants, v. CHARLES HOWE
et al., Respondents.¹

ATTACHMENT—PLEADING—AFFIDAVITS—NEGATIVE PREGNANT. Where the procuring affidavit alleged, in the conjunctive, the statutory grounds for attachment, the affidavit supporting defendants' motion to dissolve the attachment is not bad as a negative pregnant in that a clause contained therein denied the allegations, also in the conjunctive, where it further alleged, in effect, matter negating every allegation of the plaintiffs' procuring affidavit, and the same will be held sufficient to put in issue the allegations of plaintiffs' affidavit, under the statutory rules commanding a liberal construction of pleadings, and in the absence of a demurrer thereto or of a motion to make its denials more specific.

ATTACHMENT—DISSOLUTION—AFFIDAVITS—TRIAL—ISSUES AND PROOF. On hearing of a motion to dissolve an attachment, in which defendants' moving affidavit was a sufficient traverse of plaintiffs' procuring affidavit, thereby presenting an issue, the court committed no error in admitting defendants' evidential affidavits, and the burden of proof rests on the attaching party.

ATTACHMENT—GROUNDS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. The plaintiffs failed to sustain the burden of proof showing grounds for a writ of attachment, where their single evidential affidavit averred facts not grounds therefor, and every material fact relied on to sustain the writ was sufficiently denied or explained by the defendants' controverting affidavits.

Appeal from a judgment of the superior court for Pacific county, Wright, J., entered August 25, 1913, dissolving an attachment, after a hearing upon affidavits. Affirmed.

Bond & Eddy, for appellants.

Lockerby & Couden, for respondents.

ELLIS, J.—The plaintiffs brought an action against the defendants as a community, to recover upon a promissory note for \$75, and a balance of \$179.43, claimed upon an open account. They sued out a writ of attachment, and

¹Reported in 142 Pac. 450.

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caused it to be levied upon the interest of the defendant Charles H. Howe in certain saw logs. The affidavit for the attachment alleged that the defendant "is about to assign, secrete, and dispose of some of his property with intent to delay and defraud his creditors, and that the defendant is about to convert his property into money for the purpose of placing it beyond the reach of his creditors." The defendants moved to dissolve the attachment, and presented in support of the motion an affidavit of Charles H. Howe, stating that:

"He denies that the defendants are about to assign, secrete and dispose of their property with intent to defraud their creditors and denies that they are about to convert their property into money for the purpose of placing it beyond the reach of their creditors; and in that behalf states that he is a logger by occupation; and that the only sales of property made by defendant at any time prior hereto, or sales attempted to be made by defendant were for the purpose of carrying on his business of logging and to realize moneys by which they might continue to conduct said business and to pay such debts as they may have contracted from time to time during the carrying on of their said business."

On the hearing of the motion, the plaintiffs presented their joint evidential affidavit, stating, in substance, that the defendants are largely indebted, their indebtedness exceeding the value of their property, both exempt and not exempt; that the plaintiffs have repeatedly tried to get the defendants to pay their claims, and have offered to furnish the defendants further money provided they would secure the plaintiffs' claims, which the defendants refused to do; that immediately before the levy of the attachment, the defendant Charles H. Howe was endeavoring to sell, and went to practically every mill owner in Raymond to try to dispose of, his logs for the purpose of defeating the plaintiffs and other creditors of their claims; that shortly before the

commencement of this action, the defendant secured permission to sell a horse covered by a chattel mortgage which he had given to the plaintiffs, claiming that he had an offer of \$200, but affiants afterwards discovered that he was trying to sell the horse for \$275, intending to turn over to the plaintiffs only \$200 of that amount; that the plaintiffs had told the defendant that they had an opportunity to sell the mortgaged property for all it was worth, but the defendants refused to permit the plaintiffs to sell the mortgaged property; that, since the attachment in this action, the defendants have given a mortgage upon their interest in the property in question to their attorneys for the sum of \$250; that the defendant Charles H. Howe executed and delivered a bill of sale of his interest in the logs in question to his brother, J. J. Howe; that the defendant, since, the commencement of this action, has stated to the plaintiffs and to other persons, that he would not pay the plaintiffs' claim, and that all they would get would be what they could hold by their mortgage. Over plaintiffs' objection, the defendants were permitted at the hearing to present affidavits controverting the plaintiffs' evidential affidavit. One of these, made by Charles H. Howe, stated:

"He has endeavored in the regular course of his business as a logger and not otherwise to sell and dispose of the logs owned by the copartnership of Howe & Howe, and that the same was done for the purpose of realizing money from the sale thereof with which to pay his obligations. That he has never at any time attempted to sell or dispose of said logs or any other real or personal property for the purpose of cheating or defrauding the plaintiffs or any other creditors out of their lawful claims."

This affidavit then directly contradicts or explains every charge made in the plaintiffs' evidential affidavit, save one hereafter to be noticed. The other affidavit filed in behalf of the defendants was made by J. J. Howe, and denied that he had accepted a bill of sale from his brother Charles H. Howe,

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but stated that such bill of sale had been offered to him by his brother on condition that he pay all of his brother's debts, and that he, J. J. Howe, refused to accept the bill of sale on that condition. Upon a consideration of all of the affidavits presented, the court dissolved the attachment. The plaintiffs appealed.

The appellants contend that the trial court erred in dissolving the attachment for the following reasons: (1) because the affidavit supporting the motion to dissolve the attachment contained no sufficient traverse of the appellants' affidavit procuring the writ; (2) that, no issue being presented, the court should not have considered the respondents' evidential affidavits; (3) that, in any event, the evidence was sufficient to sustain the attachment.

I. The appellants urge that the affidavit supporting the respondents' motion to dissolve the attachment merely presented a negative pregnant, constituting no sufficient traverse of the averments of the affidavit upon which the writ of attachment was procured. The procuring affidavit alleged, in the conjunctive, the statutory grounds for attachment. The first clause of the sentence quoted from the respondents' affidavit in support of their motion, denied these allegations, also in the conjunctive. It cannot be questioned that, under the strict technical rules for the framing of issues, where the averments of a pleading are made conjunctively and are denied by the adversary conjunctively and *in haec verba*, without further negation or explanation, the denial is a negative pregnant, constituting an admission, and presents no issue. *Hansen v. Doherty*, 1 Wash. 461, 25 Pac. 297. An almost unlimited list of cases from other jurisdictions so holding might be cited. Had the defendants' moving affidavit contained nothing further than this clause presenting the negative pregnant, it would fall within the rule announced in the *Hansen* case. The affidavit, however, contained much more. It stated at length the character of the defendants' business; the fact that J. J. Howe, a brother of Charles H. Howe, was

his partner therein, and that they had never attempted to sell or dispose of any logs, except in the course of such business, and with the intention of procuring money for the payment of their debts. The affidavit thus, in effect, negated every allegation of the appellants' procuring affidavit. Under the rule of our general statutes relating to pleadings commanding a liberal construction as to their sufficiency (Rem. & Bal. Code, §§ 255, 285, 299 [P. C. 81 §§ 217, 259, 287]), we think the affidavit in support of the respondents' motion, in the absence of a demurrer thereto or a motion to make its denials more specific, was sufficient to put in issue the allegations of the procuring affidavit. This court, in *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399, after stating that the *Hansen* decision went to the verge of technical construction, said:

"The doctrine of negative pregnant is the doctrine of the common law, and that, together with many of the fictions of the common law, has been abrogated by our statute, and a plain and simple construction of language based upon common sense understanding has been substituted."

As pointed out in the last cited case, if there was anything indefinite or uncertain in the denial under consideration that would have raised a question in the appellants' mind as to what was denied, the code provides a remedy by motion to make the pleading more definite and certain. In this case, the respondents' moving affidavit was attacked neither by demurrer nor motion. So far as the record shows, the point now urged was raised for the first time on this appeal. However that may be, it certainly was not raised until after the appellants had presented their evidential affidavit on the merits and the respondents had filed controverting affidavits meeting every material question of fact presented. It is clear that the form of the respondents' denials constituted no surprise, worked no hardship, and led to no confusion in the trial of the issue actually tendered by the appellants' initial affidavit.

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II. What we have said of the appellants' first contention effectually disposes of their second. Since the respondents' moving affidavit was a sufficient traverse of the appellants' procuring affidavit, it follows that the court committed no error in admitting their evidential affidavits. An attachment, though auxiliary to an original action, is, in its essentials, an action presenting independent issues. By analogy to an ordinary action, the affidavit procuring the writ, and the affidavit supporting the motion to dissolve the attachment constitute the pleadings. When these present an issue, as we have held they do in this case, the burden of proof rests upon the attaching party. He must sustain that burden by evidential affidavits which the adversary may meet also by affidavits.

"The rules of evidence, when affidavits are relied upon in dissolution proceedings, are the same as when oral testimony is offered to contradict the alleged grounds for attachment. If the defendant by affidavit denies the truth of the alleged grounds, the plaintiff should be required to file such evidence as he desires, after which the defendant should file such evidence as he may see fit in contradiction thereof, and then the plaintiff should be allowed to file rebutting affidavits." 1 Shinn, Attachment and Garnishment, § 353, p. 651.

See, also, *Jordan v. Dewey*, 40 Neb. 639, 59 N. W. 88. The court committed no error in permitting the respondents to file their evidential affidavits, nor in considering them.

III. The burden of proof to sustain the grounds of the writ of attachment rested throughout upon the appellants. They sought to sustain that burden by a single affidavit, the substance of which we have set out in our statement of the case. It is first averred, in effect, that the respondents are insolvent and have refused to give the appellants a preference, though the appellants offered to advance them further money if they would do so. This is not denied, but it constitutes no ground for attachment. Insolvency alone is no ground for attachment (*Wild Rose Orchard Co. v. Critzer*, 79 Wash. 462, 140 Pac. 561). Neither is the refusal to incur

further indebtedness or to prefer a given creditor. Rem. & Bal. Code, § 648 (P. C. 81 § 415). Every other averment of the appellants' evidential affidavit was either specifically controverted, or the facts so explained by the respondents' controverting affidavits as to negative any intention on the respondents' part to defraud the appellants. If the respondents' affidavits were believed, they sufficiently deny or explain every material fact relied upon by the appellants to sustain the writ. We shall not discuss these affidavits in detail. Upon a careful consideration of the entire record, we cannot say that the decision of the trial court was not sustained by a fair preponderance of the evidence.

The judgment is affirmed.

Crow, C. J., CHADWICK, MAIN, and GOSE, JJ., concur.

[No. 11764. Department One. August 10, 1914.]

MODERN IRRIGATION & LAND COMPANY, *Respondent*, v.
HARRY J. NEELY *et al.*, *Appellants*.¹

BROKERS—CONTRACT FOR COMMISSIONS—RIGHT TO FORFEITED DEPOSITS—CONSTRUCTION. Brokers employed to sell real property and not to negotiate options, are not entitled to retain sums paid for options and forfeited by intending purchasers during the life of the agreement, but are bound to account for the same, since the consideration for the payments being furnished by the owner, he is entitled to the money.

INTEREST—LIABILITY OF AGENT ON OPEN ACCOUNT—UNLIQUIDATED DEMANDS. In an action for an accounting against brokers employed to sell lands, under a contract of four years' standing, during which time the account was open and unliquidated, it is proper to allow interest on quarterly balances as determined by expert accountants from the books of both parties, though, as a general rule, interest is not allowed on unliquidated demands, where it appears that demand had been made upon the brokers, from time to time, for an accounting and payment of balances due, with which they failed or refused to comply, and while the owner had made some sales, an accounting to the brokers for these could have been had at any time for the

¹Reported in 142 Pac. 458.

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asking; since equity will not deny interest where the balances at any period of the contract were readily ascertainable.

APPEAL—HARMLESS ERROR—SCOPE OF ACCOUNTING. In an action for an accounting, the inclusion in the final account of sums admittedly due to the plaintiff, upon land contracts assigned to the defendants, is not prejudicial error, where it appeared that the assignments were of contracts connected with the subject-matter of the agency, the parties were all before the court, no surprise was claimed, and defendants included the items in a statement looking to an adjustment of the account with plaintiff.

FRAUDS, STATUTE OF—BROKERS—CONTRACT FOR COMMISSIONS—PLEADING—ESTOPPEL. Commissions retained by brokers, acting under a contract within the statute of frauds, are not recoverable by the owner in an equitable action for an accounting, where it appears that the plaintiff failed to plead the statute, the commissions were earned under an admitted agreement, were retained without objection prior to suit, and were charged against plaintiff in his own statement of the account, his conduct amounting to an estoppel as against a plea of the statute.

COSTS—ON APPEAL—CROSS-APPEAL. Both parties having appealed, and the judgment having been affirmed, neither can recover costs on appeal.

Cross-appeals from a judgment of the superior court for Spokane county, Jackson, J., entered September 2, 1913, upon findings in favor of the plaintiff, stating an account, in an action for an accounting. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellants.

Samuel Edelstein, for respondent.

ELLIS, J.—This is an action by the owner of lands, against real estate brokers, its agents, for an accounting. A statement of the facts essential to an understanding of the issues, admitted by both parties as substantially correct, is as follows:

On March 5, 1905, the defendant Neely was, by contract with the plaintiff, made exclusive sales agent for certain of its lands. The contract contemplated sales on the deferred payment plan, deferred payments to bear seven per cent in-

terest. It provided that the agent should receive on sales a commission,

“ . . . equal to sixteen (16%) per cent of the total purchase price of each tract sold, to be paid in the following manner, to wit: if such sale is for all cash, then all commission to be paid in cash; if there are deferred payments in any of said sales, then said second party shall receive nine per cent of the total commission out of the first payment made and the balance of seven per cent out of the next payment made on said land by said purchaser (said deferred payment to draw its proportions of the earned interest, if any).”

Sometime afterwards—the exact date does not appear—the defendant Neely & Young, a corporation, succeeded to the rights of the defendant Neely under this contract, and proceeded with its performance, with the consent of the plaintiff. In December, 1909, the contract was terminated by mutual consent of the parties then interested. During the continuance of the contract, sales aggregating several hundred thousand dollars were made. The defendants did not deduct their commissions at the time sales were made, but, from time to time, at first frequently, but latterly at long intervals, turned over to the plaintiff all of the proceeds of some of the sales, retaining the proceeds of other sales in amounts which they assumed were approximately equal to the commissions then earned. The plaintiff also made sales from time to time of which the defendants had no record, and upon which they were entitled to commissions.

In addition to the foregoing admitted facts, it appears, from a fair preponderance of the evidence, that the plaintiff demanded from the defendants, from time to time, an accounting for moneys received by them on collections and a payment of balances due, but that no such accounting was ever made. It also appears, from a fair preponderance of the evidence, that the defendants could have had from the plaintiff, at any time, an accounting for all sales made by the plaintiff of which the defendants had no record. In fact, the

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defendants' bookkeeper testified that he received such information every time he applied for it.

The trial court, after what appears to have been a most careful examination of the accounts of both parties, in the light of exhaustive evidence and with the assistance of experts, cast a final account, showing a balance due plaintiff in the sum of \$9,813.14, and entered judgment accordingly. The defendants took an appeal; the plaintiff took a cross-appeal. The parties will, therefore, be designated throughout as plaintiff and defendants.

We shall first take up the defendants' appeal, and, so far as they require discussion in detail, dispose of the questions presented.

I. It was admitted that, during the life of the agreement, the defendants received, as earnest moneys from intending purchasers, sums aggregating \$2,944.40, which sums were forfeited by such intending purchasers. The court found that these moneys belonged to the plaintiff, and should have been remitted by the defendants quarterly, less their commissions; that, as the defendants would have been entitled to nine per cent on the first payment of thirty per cent of the purchase price, had the sales been consummated on the usual terms, the defendants were entitled to have these earnest moneys pro rated accordingly. He therefore allowed the defendants a credit of thirty per cent of this amount, less interest on quarterly balances of these earnest moneys during the time they were retained and unaccounted for by the defendants.

The defendants contend that the court erred in holding that they were bound to account for any of these moneys. It is argued that the defendants were employed to make sales, not to negotiate options, hence were not entitled to commissions on moneys which were paid for options and that, therefore, the plaintiff was not entitled to the moneys forfeited on these options. If the plaintiff were questioning the defendants' right to the commissions allowed on these moneys, the

premise might be granted. *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 Pac. 368; *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350. The question not being raised, we do not decide it. The conclusion, however, does not follow. The moneys were paid for options on plaintiff's lands. The consideration proceeded from the plaintiff. Having furnished the consideration, the plaintiff was entitled to the money paid therefor. *Chambers & Co. v. Herring* (Tex. Civ. App.), 88 S. W. 371; *Pierce v. Powell*, 57 Ill. 323; *Gilder v. Davis*, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398.

II. The court allowed interest on quarterly balances as determined by expert accountants from the books of both parties. The defendants claim that, inasmuch as the parties operated under the contract for nearly four years, during which time the account was open, no interest should have been allowed. It is true, of course, that, as a general rule, interest is not allowed upon unliquidated demands. This rule, however, like nearly all general rules, has its exceptions. Courts will not hesitate to make it yield to the equities of a given case. In this case, the court found, upon sufficient evidence, that the plaintiff demanded of the defendants, from time to time, an accounting and payment of balances due; that the defendants failed to render such periodical statements and failed and refused to remit balances on hand at periodical times, and that a reasonable time for such statements and remittances was every three months. While the plaintiff had made some sales from time to time, the evidence is clear that the defendants could have had an accounting for these at any time for the asking. The evidence was conflicting upon these points, but a consideration of the entire record convinces us that the whole difficulty arose from the remissness of the defendants in the matter of accounting at reasonable intervals. In such a case, it would be most inequitable to deny interest on balances cast at reasonable intervals, the means for determining such balances being always at hand.

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"In the absence of any agreement in this respect, express or implied, the rule is that it is the duty of an agent to render accounts of his dealings to his principal whenever they are demanded, or, in the absence of a demand, within what is a reasonable time under the circumstances of the particular case, unless the nature of the agency is such as to exclude such a duty. Thus, where an agent has collected money for his principal, it is his duty to render an account or give notice thereof within a reasonable time, in order that the principal may give him instructions in regard to the manner of remitting it; unless such instructions were given at the time of the employment, in which case he should remit without such notice." 1 Clark & Skyles, Agency, § 422.

The same text, after stating that an agent cannot be charged with interest where he has held himself in readiness to account on demand, in the absence of an express agreement to pay interest, continues:

"But where he has neglected or refused to account for money in his possession belonging to his principal, as by refusing or neglecting to pay it over when it is his duty to do so, or by not applying it to the purpose for which it was given to him, he will be liable to his principal for interest thereon from the time of such neglect or default." *Id.*, § 424.

See, also, 31 Cyc. 1479; *Crawford v. Osmun*, 90 Mich. 77, 51 N. W. 356; *Tompkins v. Tompkins*, 18 S. C. 1. Moreover, in such a case as this, where the balance at any given period throughout the running of the contract was capable of ready ascertainment by mere computation, the old common law rule has been much relaxed. In such cases, authority is not wanting that the demand should be treated as liquidated from the time when its certainty was so simply determinable. 22 Cyc. 1513; *Butler v. Kirby*, 53 Wis. 188, 10 N. W. 373; *Bartee v. Andrews*, 18 Ga. 407; *Sweeny v. New York*, 173 N. Y. 414, 66 N. E. 101; *Graham v. Chicago, M. & St. P. R. Co.*, 53 Wis. 473, 10 N. W. 609. This modification of the common law rule is distinctly recognized, though not held applicable, in the following cases: *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 73 N. E. 494,

106 Am. St. 498; *Gray v. Central R. Co.*, 157 N. Y. 483, 52 N. E. 555. Under the circumstances of this case, we find no error in the allowance of interest upon the quarterly balances.

III. The court, in casting the final account, charged the defendants with amounts, admittedly due to the plaintiff, upon certain land contracts which had been assigned to the defendants. It is urged that, as to these contracts, the defendants were simply purchasers, and, since the action was one for an accounting between principal and agent, these contracts had no place in the issues. The action was one in equity. These assignments were of contracts connected with the subject-matter of the agency. All parties in interest were before the court. We can conceive of no prejudice resulting to the defendants from including these items in the final account, and none is suggested. No surprise is or can be claimed. These items were included in the defendants' own tentative statement looking to an adjustment of their account with the plaintiff. We find no error in their inclusion in the final settlement.

It is also claimed that the court erred in its findings touching certain specific transactions. These, for the most part, involve small amounts, and are dependent upon conflicting evidence. We shall not review them in detail. We have examined the lengthy abstract of record with much care. Frequently throughout we have resorted to the statement of facts. While the court may have made some mistakes, we are satisfied that it has reached as nearly an accurate result as would be attained if we essayed any corrections.

IV. The above conclusion applies with equal force to most of the assignments of error argued on the plaintiff's cross-appeal, which presents but one question calling for more specific discussion. The plaintiff sought to invoke the statute of frauds against the retention by the defendants of certain commissions upon sales of lands platted in connection with the lands included in the sales agency contract, but not included in the description contained in that contract. The court

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found that, after the execution and delivery of the agency agreement, the plaintiff platted the lands therein described, together with other lands acquired by it subsequent to the agreement, into a plat known as "Opportunity"; that no supplemental agreement in writing relative to the sales agency for such additional lands was entered into between the plaintiff and the defendants; that, by mutual consent of plaintiff and defendants, the defendants sold several parcels of land included in the plat of Opportunity not embraced within the lands described in the original sales contract; and that the commissions with the interest thereon, retained by the defendants upon the sales of such unincluded lands, aggregate the sum of \$84,842.18. The court further found that these lands were listed with the defendants for sale as a part of the plat of Opportunity, and that the defendants reported such sales from time to time, deducting and claiming commissions on such sales, without objection from the plaintiff at the time such commissions were so deducted and claimed. The court held that, by its acquiescence in this course of conduct, the plaintiff had waived the right to claim the benefit of the statute of frauds as to these commissions.

The evidence is convincing that these sales were made with the understanding on both sides that they should be considered as coming under the terms of the original contract. In fact, the manager of the plaintiff so admitted. They covered a considerable period of time, and, as a matter of fair dealing, the plaintiff, if it did not intend to extend the memorandum of agreement to cover them, should have so indicated. Doubtless, had such an intimation been made, the defendants would have confined their activities to the land described in the agreement. This action is one of equitable cognizance, and the equities of the situation are so clearly with the defendants as to these commissions that, unless we are so constrained by our own decisions, we should be slow to disturb the decision of the trial court. Unquestionably, if the defendants were suing to recover unpaid commissions for the sale of these

lands, they could recover only as to those described in the written agreement. This is too firmly established to admit of cavil. *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660; *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947; *Swartswood v. Naslin*, 57 Wash. 287, 106 Pac. 770. It is also well established that the fact that the sales were actually made would alone furnish no ground for a recovery. Performance alone does not take the contract out of the purview of the statute where the agent is compelled to resort to an action on the contract to recover his commissions, nor authorize a recovery upon a *quantum meruit*. This is because any other view would abrogate the statute by implying a contract which, by the terms of the statute, could only be proved by a written memorandum. *Keith v. Smith*, 46 Wash. 131, 89 Pac. 478; *Cushing v. Monarch Timber Co.*, *supra*.

Here, however, the plaintiff is invoking the aid of a court of equity for an accounting. Baldly stated, its position as to these commissions is the claim of a right to recover moneys fully earned and voluntarily paid under a contract, fully performed on both sides, on the ground that the contract was within the statute. We have been cited to no authority sustaining a recovery in such a case. In its own comparative statement, rendered to the defendants, prior to suit, the plaintiff charged itself with all of the commissions claimed by the defendants, including those here involved, less certain overcharges with which we are not here concerned. In its complaint, it did not set up a claim to these commissions on a plea of the statute of frauds, though it was then cognizant that these commissions had been retained by the defendants. The bar of the statute was pleaded for the first time in the reply. The scope of an action usually cannot be so enlarged.

We have held that, when a plaintiff, suing on a contract within the statute, fails to disclose in his complaint whether the contract was oral or written, the defendant may rely upon the statute without in terms pleading it. *Taylor v. Howard*, 70 Wash. 217, 126 Pac. 423; *Goodrich v. Rogers*, *supra*.

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But this is not such a case. These commissions were earned under an admitted agreement. They were retained without objection prior to suit. The plaintiff charged itself with them in its own statement of the account. It cannot recover them in a suit in equity for an accounting. To hold otherwise would be, in effect, to say that no conduct can operate as an estoppel as against a plea of the statute. This court has held to the contrary. *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565.

The judgment is affirmed. Both parties having appealed, neither can recover costs.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11792. Department Two. August 10, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. ELIDA KNUTSON,
Respondent.¹

NUISANCE—PLEADING—COMPLAINT—CAPTION—MATERIALITY. There is no defect of parties plaintiff, in an action charging defendant with maintaining a nuisance, because the caption failed to show that the action was brought "upon the relation of the prosecuting attorney" as provided by 3 Rem. & Bal. Code, § 946-2, but the complaint will be held sufficient where the first paragraph recites "Comes now M., deputy prosecuting attorney of Kitsap county, Washington . . . in the name of and by the authority of the state of Washington, complains of said defendant, as follows, to wit, etc."; since the omission is clearly supplied by allegations in the body thereof clearly affixing to plaintiff his representative character.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered December 23, 1913, dismissing an action to restrain a nuisance, upon sustaining a demurrer to the complaint. Reversed.

F. W. Moore, for appellant.

Gill, Hoyt & Frye, for respondent.

¹Reported in 142 Pac. 444.

MOUNT, J.—This appeal is from an order sustaining a demurrer to a complaint and dismissing the action. The state has appealed.

The action was brought by the prosecuting attorney of Kitsap county, charging the defendant with maintaining a nuisance under § 1, ch. 127, Laws of 1913, p. 391 (3 Rem. & Bal. Code, § 946-1). The caption of the complaint is as follows: "State of Washington, Plaintiff, v. Elida Knutson, Defendant." The first paragraph of the complaint is as follows:

"Comes now R. M. Morford, Deputy Prosecuting Attorney of Kitsap County, Washington, duly appointed and qualified, in the name of and by the authority of the State of Washington, complains of said defendant, Elida Knutson, as follows, to wit:—"

Then follows an allegation charging the maintenance of a nuisance and the prayer for restraining the nuisance, etc. The defendant appeared to the complaint and filed a demurrer thereto upon two grounds, viz.:

"1. That there is a defect of party plaintiff.

"2. That the complaint does not state facts sufficient to constitute a cause of action against the defendant."

The defendant did not prosecute this demurrer with diligence, and it was overruled for want of prosecution. The defendant thereafter answered and denied generally the allegations of the complaint. The case came on for trial upon the issues made by the complaint and answer, and the defendant at that time, by leave of court, renewed her demurrer on the ground of defect of parties plaintiff. This demurrer was sustained by the court, and leave of the prosecuting attorney to amend the complaint was denied. The action was thereupon dismissed.

The appellant argues three or four questions in the brief, among them, that the court erred in denying its right to amend and that the filing of the answer was a waiver of the demurrer. We shall not notice these questions, because they

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are unimportant in view of our conclusion upon the one now to be noticed.

The trial court was of the opinion that there was a defect of parties, because, in the title of the case, it was not stated, The State of Washington "upon the relation of the prosecuting attorney of Kitsap county," and for that reason sustained the demurrer. The statute at § 2 (Id., § 946-2) provides:

"Whenever a nuisance exists, as defined in this act, the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the state of Washington upon the relation of such prosecuting attorney or citizen, to perpetually enjoin said nuisance . . ."

The caption to the action in this case is "State of Washington, Plaintiff, v. Elida Knutson, Defendant." The complaint shows that it is prosecuted by the state upon the relation of the deputy prosecuting attorney of Kitsap county. The very first paragraph of the complaint as set forth above so states. There is no magic in the caption to an action, especially where the body of the complaint itself shows who the parties are and the capacity in which the action is prosecuted or defended. It is true, as argued by the respondent, that the statute says that the prosecuting attorney may maintain an action in equity in the name of the state of Washington "upon the relation" of such attorney. But if the caption is insufficient, and that insufficiency is supplied by allegations in the complaint, the complaint is certainly sufficient. In other words, the character in which the party sues is determined, not from the description which he gives himself in the caption, but from the body of the complaint. The averments in the complaint are sufficient to affix to the plaintiffs their proper representative character, and when that appears in the body of the complaint, an erroneous description in the caption is immaterial. *Knox v. Metropolitan El. R. Co.*, 12 N. Y. Supp. 848.

We are satisfied, therefore, that the complaint shows that the action is prosecuted in the name of the state of Wash-

ington, upon the relation of the deputy prosecuting attorney of Kitsap county, and the complaint was therefore clearly sufficient, and there was no defect of parties.

The judgment of the trial court is therefore reversed, and the cause remanded for further proceedings.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11833. Department Two. August 10, 1914.]

M. P. BOGLE, *Appellant*, v. A. J. DEVLIN *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. Findings of the lower court upon evidence sharply conflicting upon every material point, will not be disturbed on appeal, unless the evidence preponderates against them.

Appeal from a judgment of the superior court for Spokane county, McCroskey, J., entered July 1, 1913, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Cannon, Ferris & Swan and *John M. Cannon*, for appellant.
Robertson & Miller, for respondents.

MORRIS, J.—Appellant instituted this action to recover the commission alleged to be due him as a broker, in negotiating a sale for the respondents of certain shares of the capital stock of the Rose Lake Lumber Company. The lower court, after hearing the evidence, made two findings of fact, to the effect, (1) that there was no agreement between the parties for the payment of commission; and (2) that the parties had effected a full and complete settlement of the claim for commission by the payment and acceptance of \$1,250, which settlement was a fair and equitable adjustment of appellant's claim. Upon these findings, judgment was entered for respondents.

¹Reported in 142 Pac. 433.

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The appellant challenges the sufficiency of the evidence to sustain these findings. It is evident that, since no questions of law are involved in the case, the only duty of this court is to examine the record for the purpose of ascertaining whether the evidence preponderates in favor of or against the findings. Having done so, we announce our decision in favor of the findings as made by the lower court. There is a sharp conflict in the evidence upon every material point, so much so that the respective parties in their briefs make open accusations of perjury. This being the case, the lower court's determination of the facts is entitled to great weight, and should be sustained unless the evidence preponderates against them. It cannot be said in this case that it does. On the other hand, in our opinion, the findings are in accord with the weight of the evidence. The rule so often announced by this and other appellate courts makes further comment unnecessary.

The judgment is affirmed.

Crow, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 11857. Department Two. August 10, 1914.]

CRAB CREEK LUMBER COMPANY, *Respondent*, v.
THE TOWN OF OTHELLO, *Appellant*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—SALE OF MATERIAL TO CONTRACTOR. In an action by a materialman against a town to recover for lumber sold to a contractor to be used in the construction of cross-walks and sidewalks, the court properly held that the sidewalks were built under contract with the town, and not under contract with property owners as alleged by defendant, where it appeared that the town council, after agreement with the contractor to build the cross-walks, allowed and paid a portion of his bill therefor, and afterwards assessed abutting property where the owners had not paid for the cost of sidewalks, and that a portion of the assessments had been paid.

PLEADING—REPLY—DEPARTURE. There is no departure between the amended complaint and the reply, in an action by a materialman for lumber sold to a contractor to be used in building sidewalks, where the complaint alleged the building of the sidewalks under contract with the town, while the reply alleged acts of the town relied upon as showing an arrangement between the town and the contractor for the building of the walks which would in law be in effect a contract though none had formally been entered into, there being no abandonment of the cause of action as pleaded.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—FAILURE TO TAKE BOND—LIABILITY TO MATERIALMAN—NOTICE. Rem. & Bal. Code, § 1161, providing for notice to a municipality by a creditor of a contractor claiming under a bond taken by the city for the protection of laborers and materialmen, does not apply in an action by the contractor to enforce liability against the city for failure to require the statutory bond.

SAME—LIABILITY OF CITY—DEFENSES—JUDGMENT AGAINST CONTRACTOR. The fact that the materialman had obtained judgment against the contractor on promissory notes, does not bar recovery in an action against the town for the material furnished, the liability of the town being a statutory one and not affected by the condition of the indebtedness as between the contractor and his creditors.

APPEAL—REVIEW—EXCEPTIONS—EFFECT—RECORD. Where, after a consultation between court and counsel at the conclusion of the evidence, the court announced judgment for the plaintiff, and subsequently filed a written memorandum of findings and judgment, which

¹Reported in 142 Pac. 429.

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appeared as part of the statement of facts, reciting that "By consent of the parties theretofore, the jury was discharged from further consideration of the case, judgment to be rendered by the court," and, at the bottom of the page containing the court's announcement of the jury's discharge and judgment for plaintiff, appeared "Exception allowed defendant," the discharge of the jury must be accepted as a fact certified by the court that the same was consented to, and that the exception went only to the amount and form of the judgment.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered December 1, 1913, upon findings in favor of the plaintiff, in an action for lumber sold to a contractor, used in a city improvement. Affirmed.

John Truax, for appellant.

Miller & Lewis, for respondent.

MORRIS, J.—Respondent brought this action to recover from appellant a balance due it on account of lumber sold to Robert Sams and used in the construction of sidewalks and cross-walks within the town of Othello. The complaint, as amended, alleged a contract between Sams and the town for the construction of these walks, and further alleged that the town neglected to obtain a bond from Sams for the protection of materialmen.

The town, answering this complaint, denied that it had any contract with Sams, and alleged that Sams made a private contract with a number of property owners for the building of the sidewalks, and that the town then agreed with Sams that he should build cross-walks and the town would pay him for the material and labor entering into the cross-walks. It was further alleged that the amount due respondent from Sams had been merged into promissory notes upon which judgment had been entered. In reply, it was set up that the town council, after its agreement with Sams to build the cross-walks, allowed and ordered a portion of his bill paid, and afterwards prepared an assessment roll and assessed abutting property, in cases where the owners had not paid Sams, for the cost of adjacent walks; that an ordinance was

subsequently passed confirming the assessment roll; and that the sums not paid were certified to the county treasurer and placed upon the tax rolls against the delinquent property; that a portion of these assessments had been paid.

The cause was set for trial as a jury cause and, upon the hearing, objection was made to the introduction of testimony, upon the ground that the respondent had no cause of action against the town, having elected to sue Sams upon the notes without joining the town, and that all respondent's rights had been merged in the judgment upon the notes. This objection was overruled. At the close of respondent's testimony, appellant moved for a directed verdict upon the ground that there was a departure between the amended complaint and the reply, in that, while in the complaint respondent had alleged a contract between Sams and the town, in the reply, liability was sought against the town upon the theory of estoppel because of facts therein alleged. This motion was denied. After some colloquy between the court and counsel as to the status of the case as developed by the evidence, the lower court announced its opinion that the jury should be discharged and judgment should go against the town for \$331, the amount collected by the town under the assessment it had levied against abutting property. The jury was then discharged, and the lower court, in making up its judgment some days later, added to the first amount \$196.14 as the cost of the material entering into cross-walks. From these several rulings, appeal has been taken.

So far as the facts are concerned, there was no dispute between the parties. The only question before the court was the proper judgment to be entered. Certainly, so far as the cross-walks were concerned, the court was justified in holding that they were built by Sams under contract with the town. If there was no agreement between the town and Sams as to the sidewalks themselves, it might be pertinent to inquire why the town was levying an assessment against abutting property. This act can be interpreted in no other way than

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that Sams, in building these walks, acted with authority from the town. The only difference between the complaint and the reply was that the complaint alleged the building of the sidewalks under contract with the town, while the reply alleged the acts of the town which were relied upon as substantiating the claim that there was some arrangement between the town and Sams for the building of these sidewalks that would in law be in effect a contract though none had been formally entered into. A departure takes place when the party abandons his ground for recovery in favor of some new ground. Here, it seems to us, the reply did not abandon the cause of action as pleaded. When it set forth facts which it contended evidenced the relation between Sams and the town, it showed a recognition by the town that Sams was engaged in municipal improvement to such an extent as to make it obligatory upon the part of the town to require a bond for the payment of the indebtedness contracted in the work if it wished to avoid liability for such indebtedness.

There is no merit in appellant's contention that respondent has failed to comply with Rem. & Bal. Code, § 1161 (P. C. 309 § 97) relative to notice, where the creditor of a contractor of a municipality claims upon a bond taken by the municipality for the protection of laborers and materialmen. This was not an action upon a bond, and the section does not apply where liability is sought to be enforced against the municipality because of its failure to require the statutory bond.

There is no merit in appellant's contention that obtaining judgment upon the notes operated as a bar to respondent's recovery. The liability of the town is a statutory one growing out of its failure to require a bond, and this liability is not affected by the conditions of the indebtedness as between the contractor and his creditors. The statute, Rem. & Bal. Code, § 1159 (P. C. 309 § 98), covers all cases where dues and demands incurred in the performance of the work remain unpaid.

Appellant contends that the lower court should not have discharged the jury. The record is not clear as to the attitude of the parties at the time this order was made. The court and counsel for the respective parties, at the conclusion of the evidence, retired into the court's chambers, and while there entered into a discussion as to what should be done. Just what this discussion was does not wholly appear. It is evident that the court and counsel considered what there took place as a part of the trial proceeding, just as if it had taken place in the court room upon the withdrawal of the jury. The court then returned to the bench and announced its conclusion that there was nothing to submit to the jury, and that judgment should go for respondent. Subsequently the court filed a written memorandum of its findings and judgment which appears as part of the statement of facts, in which is recited "By the consent of the parties theretofore, the jury was discharged from further consideration of the case, judgment to be rendered by the court;" while at the bottom of the page containing the announcement by the court of the discharge of the jury and its announcement that respondent was entitled to judgment for \$331, together with a lien on the assessments unpaid, appears in pencil, "Exception allowed defendant." It seems to us that we must accept the fact as certified by the court that the discharge of the jury was consented to, and that the exception noted went only to the amount and form of the judgment the court ordered to be entered.

We will not make special mention of other errors assigned by the appellant. They have all been given attention, and we find nothing demanding a reversal of the judgment, and it is affirmed.

CROW, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

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[No. 11875. Department One. August 10, 1914.]

CARL W. PEARSON *et al.*, *Appellants*, v. CAROLINE GULLANS
et al., *Respondents*.¹

CONTINUANCE—GROUNDS—SURPRISE. It is not error to deny a continuance upon granting leave to amend the answer, where the amendment pleaded facts within the knowledge of the plaintiffs and which they should have been prepared to meet under the general issue, and it does not appear that prejudice resulted thereby.

PLEADING—TRIAL AMENDMENT—DEFINITENESS—PREJUDICE. A trial amendment of the answer is not indefinite and uncertain if sufficient to apprise plaintiffs of defenses relied on; the facts pleaded being within their knowledge, and, in effect, proven by calling one of them to the stand.

APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE. Error cannot be predicated upon the exclusion of evidence as to a conversation after having admitted part of it, where the entire transaction was testified to by other witnesses.

COSTS—TAXATION—WITNESS FEES. Mileage of a witness may be taxed as costs though the witness failed to report attendance to the clerk from day to day as provided by statute, if the witness was called to the stand and testified.

EXCHANGE OF PROPERTY—FRAUD—RESCISSION—WAIVER—LACK OF DILIGENCE. Rescission will not be allowed plaintiffs, parties to a contract for an exchange of properties, who, after ample time to ascertain alleged fraud inducing the exchange, treated the land as their own and offered it for sale for their own benefit, and several months later brought suit to rescind.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—LACHES. The right to rescind must be promptly exercised and will not be granted to vendees, where the parties had ample time to inspect the land, did so inspect it, treated it as their own, and later offered it for sale without notice to the vendors of any dissatisfaction, and delayed four months longer before bringing suit to rescind.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 4, 1913, upon findings in favor of the defendants, in an action for rescission of a trade of lands, tried to the court. Affirmed.

¹Reported in 142 Pac. 456.

Coleman, Fogarty & Anderson, for appellants.

Saunders & Nelson and *C. A. Applegren*, for respondents.

CHADWICK, J.—This action was begun by plaintiffs, praying for the cancellation of a deed to property conveyed by the plaintiffs to the defendants in exchange for three hundred and sixty acres of land in the state of Michigan, deeded by defendants to plaintiffs. The transaction took place in the month of February, 1912. Plaintiffs went upon the land on the second day of May and again on the second day of July. They had not seen the land at the time of the exchange, and now contend that the facts with reference to it were fraudulently represented and concealed by the defendants. At the time of the transfer, plaintiffs executed a mortgage in favor of the defendants for the difference in the agreed value of the two properties. About July first, 1912, plaintiffs gave an option to purchase the Michigan land. At the same time, they telegraphed to the defendants that the land had been sold, and requested them to forward a release of the mortgage, which was done. This action was begun in October, 1912. The court, after a full hearing, held that the delay in bringing the suit to rescind, coupled with the fact that the defendants had treated the property as their own and had negotiated for its sale, was a bar to a rescission.

The first error complained of is that the court denied a continuance after giving respondents leave to amend their answer upon the trial. The answer, after admitting the exchange, denied the fraudulent representations. The amendment pleaded the fact that appellants had discovered all of the facts relied on as early as May second, 1912; that, after they had discovered such facts, they had treated the land as their own, offering it for sale for their own benefit. This was not error, for several reasons. The amendment plead facts within the knowledge of the appellants and which they should have been prepared to meet under the general issue,

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for the very essence of a complaint for a rescission is that the contract has not been affirmed. Appellants say, if the trial court had granted a continuance, they "possibly" would have been able to obtain testimony to show why the party who held the option refused to purchase the land, and would "probably" have been able to produce a copy of the telegram and other documentary evidence. The reason why the land was rejected by the option holder and the form of the telegram could not have been material. The fact of the option and the release were the ultimate facts. But granting that this testimony was material and not cumulative, appellants might have made a showing of prejudice upon a motion for a new trial. We find nothing in the record to indicate that this was done. It does not appear upon the whole record that appellants were prejudiced in any way by the amendment.

It is also complained that the amendment should have been more definite and certain. We find no merit in this contention. It was sufficient to apprise appellants of the defenses relied on; the facts pleaded being within their knowledge, and, as it transpired, proven, in the main, by calling one of them to the stand.

It is also complained that the court excluded evidence as to an entire conversation, having admitted a part of it. There was no prejudice, inasmuch as the entire transaction was gone into and was testified to by other witnesses.

It is complained that the court erred in taxing costs; that one Maud Gullans was allowed mileage from Vancouver, Washington, to Everett, Washington, she being a resident of the state of Oregon, and having failed to report her attendance to the clerk from day to day. The case of *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737, is relied on. The statute was passed to cure an existing evil, that is, the procurement of witnesses who were not called in good faith. Manifestly, if a witness is called to the stand and testifies, the object of the statute is accomplished. It was so held in *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

Upon the merits of the case, we are satisfied that the court arrived at a correct conclusion. This court has been more than liberal, even generous, in allowing a rescission of fraudulently induced contracts for the purchase of land; but our attention is called to no cases holding that a vendee can, after ample time to ascertain the facts and after undertaking to turn the land into a fair bargain on his own account and after a lapse of several months, rescind his contract. The decision of the trial judge is consistent with the rule announced by this court in the following cases: *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; *Angel v. Columbia Canal Co.*, 69 Wash. 550, 125 Pac. 766; *Wetternach v. Jones-Thompson Inv. Co.*, 77 Wash. 144, 137 Pac. 442.

It is contended that the acts of the appellants were not inconsistent with the right to rescind; that they were no more nor less than an effort to save themselves from further loss. Courts have frequently held, under inducing circumstances, that an offer to sell may not be inconsistent with the right of rescission; but where, as in this case, the parties had ample opportunity to inspect the land and did inspect it without demur, and sixty days thereafter offered it for sale without any notice to the vendors that they were dissatisfied with their bargain, and not having brought an action for nearly four months after they had offered it for sale, rescission has never been approved by the courts so far as we are informed. The right to rescind must be promptly exercised. It is universally held that the purchaser cannot treat property as his own and enjoy the right to rescind any more than the purchaser of personal property can depend upon an express warranty of quality and at the same time rescind a bargain.

We find no error, and the judgment is affirmed.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

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[No. 11925. Department Two. August 10, 1914.]

J. W. DAY *et al.*, *Appellants*, v. JAMES HENRY *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY DEBTS—TORTS—ACTS IN OFFICIAL CAPACITY. A judgment rendered against a member of a community, for a wrongful levy made by him while sheriff, is not a community debt, and the community property is not liable therefor.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 20, 1913, dismissing an action to enjoin an execution sale, upon sustaining a demurrer to the complaint. Reversed.

Wende & Taylor, for appellants.

Ryan & Desmond and *Englehart & Rigg*, for respondents.

MORRIS, J.—Appellants brought this action, seeking to enjoin the sale of community lands owned by them upon an execution, issued upon a judgment rendered against appellant J. W. Day for a wrongful levy made by him while sheriff of Yakima county. A demurrer was interposed to this complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained and the action dismissed. It will not be necessary to recite the allegations of the complaint, since the above facts are all that are material to the questions submitted by the appeal.

The trial judge filed a memorandum decision, in which he expressed the view that *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913 A. 318, 36 L. R. A. (N.S.) 88, controls the judgment, and that *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688, which would, if applicable, call for a different rule, is overruled by the latter case. We find no conflict in these two cases. Nor is anything said in the latter

¹Reported in 142 Pac. 439.

case which weakens the authority of *Brotton v. Langert*, when applied to like facts. Brotton was a constable and, as such, had sold on execution personal property in which Langert had a special property as mortgagee. Langert then sued Brotton and obtained a judgment against him for the value of the property. Brotton's wife then commenced an action, seeking to prevent the extension of this judgment over community real estate and to obtain an injunction against the selling of the community property under the Langert judgment. The lower court sustained a demurrer to her complaint and dismissed the action, when she appealed to this court, where it was held that the judgment against Brotton, having been obtained against him upon an official act, was not a community debt, and the community property could not be held for its payment. The rule there announced has been cited approvingly in *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738, and *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022.

In the *Milne* case, it was held that a community liability was created when a husband, driving an automobile for hire for the benefit of the community, negligently injured a passenger. It was there contended that the *Brotton* case was authority against the community liability, but we held otherwise, finding a distinction between cases where the wrongdoer was an individual belonging to a community, and where the community itself was the wrongdoer. There is no ground for holding that the *Milne* case overrules the *Brotton* case. The court, in finding a distinction between the two cases, attempted to lay down a line of demarcation which it seems to us is an easy one to follow. If the community as such does a wrong, it must respond, just as under the same circumstances a corporation, a partnership, or any other legal entity composed of more than one person, must respond. If, on the other hand, an individual member of any of these legal entities commits a wrong, there is no liability attached to the entity simply because of his relation to it. The lia-

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bility, if at all, must be based upon the act, and flows against the one who does the act, and that one only, excepting in the cases where the doctrine of *respondeat superior* (not applicable here) has worked out a different rule. The court, unfortunately, in the *Milne* case, says the logic of the *Brotton* case was with the appellant in his contention against community liability. This expression is now seized upon as an overruling of the *Brotton* case. Whatever meaning was sought to be conveyed by the use of such language, it is evident it was not intended to be accepted as a departure from the rule announced in the *Brotton* case, and in announcing our adherence to both cases, we find them harmonious.

We shall not discuss why the rule of the *Milne* case should be followed, as that question is not before us. The sheriff who made the wrongful levy which resulted in the judgment against him was neither a community nor the member of a community. The individual who filled the office of sheriff was a member of a community, but that membership was as to his individual, and not his official, relation. The office of sheriff could be filled only by the one elected to that office. The duties of the office could be performed only by the one elected to that office, or his duly appointed deputies. The levy made was not made by the community but by the official. In the *Milne* case, the community was running an automobile for hire for its benefit. The community created and maintained the business and profited by it. In this case—and the same is true of the *Brotton* case—the sheriff's office was not created or maintained by the community. It was an office created by the people for their benefit, and as such they maintained it. The mere fact that the occupant of the office is a married man, and uses the salary of the office to support his family, gives the family no claim on the office. It cannot enforce obligations due the office, nor can obligations against the office be enforced against it. Respondent argues that there is no distinction, in enforcing a liability against a community, between the negligent acts of the husband in

driving an automobile and the wrongful act of a sheriff, who happens to be a married man, in making a levy. The distinction is as clear as any distinction can be. The community drives the automobile; the community does not make the levy. The one is a community tort; the other is an official or separate tort.

It does not seem to us that we need say more. The judgment is reversed.

CROW, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 11946. Department One. August 10, 1914.]

CHARLES NORMAN, *Respondent*, v. ALASKA COAST COMPANY,
Appellant.¹

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE AND APPLIANCES—NEGLIGENCE—QUESTION FOR JURY. In an action by a seaman injured when a winch on which he was standing suddenly started up owing to an alleged defect in a clamp and set screw, the question of the master's negligence in furnishing safe appliances and a reasonably safe place to work is for the jury, where it appears that the servant's position on the "fleeting drum" of the winch was, owing to the crowded condition of the deck, the only practicable way to perform the work in hand, that it was impossible to tell by looking whether the steam operating the winch was on or off, and that while there was testimony to the effect that the winch had been repaired shortly before and was in good repair, other testimony showed such repairs, if made, were not properly made, and that the clamp and set screw, designed to hold the lever in place, were defective.

SAME—CONTRIBUTORY NEGLIGENCE. Whether the servant was negligent in taking his position on the "fleeting drum" of the winch was a question for the jury.

SAME—ASSUMPTION OF RISK. The fact that the servant was an expert winchman, and that the winch was open to examination, would not charge him with negligence, as a matter of law, in stepping upon the "fleeting drum" of the winch without orders to do so, but the question was one for the jury, the servant having run the winch only a short time, had not set the lever, and did not know

¹Reported in 142 Pac. 434.

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whether the steam was on or off; since he had a right to assume that the lever and set screw were in proper condition, and that the winch would remain idle until some one set it in motion.

SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHOD OF WORK—QUESTION FOR JURY. The evidence shows that a servant was not negligent in choosing an unsafe way in performing certain duties, where he chose the only practicable way and the usual and customary one, and that had he chosen an alleged safer way, he would have been unable to perform the work.

SAME—CONCURRING NEGLIGENCE OF FELLOW SERVANT. If the negligence of the master concurs with that of a fellow servant in causing an injury, the master is liable.

SAME—DEFENSES—INDUSTRIAL INSURANCE ACT—COMPLIANCE WITH ACT. It is no defense, in an action for injuries to a servant, that the case falls within the industrial insurance act, where the defendant failed to allege or prove compliance with the act.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for injuries to a seaman, thirty-eight years of age, and earning \$80 a month with board, is not excessive, where he suffered a fracture of both bones of the right leg near the ankle, and a dislocation of the knee; he was in the hospital for seven months, where he underwent several operations on account of his injuries, and was, at the time of the trial, twenty-one months after the injury, unable to resume his occupation as a sailor, the medical testimony showing that the injury would likely prove permanent, and that it would be a year or more before he could resume his former occupation.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 5, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a seaman in loading a ship. Affirmed.

W. C. Morrow and *Richard Saxe Jones*, for appellant.

Gill, Hoyt & Frye, for respondent.

Gose, J.—Plaintiff brought this action to recover damages for personal injuries sustained while in the employ of the defendant. He was successful in the court below. The defendant has appealed.

The respondent, a few days before he sustained the injury, had entered the service of the appellant as an "able seaman," upon the steamship Jeanie, which was loading for ports in Southwestern Alaska. He is an experienced sailor and winch tender. The Jeanie is equipped with three winches, a double winch and a single winch on the forward deck and a single winch at the stern. The respondent was injured on the forward single winch. One Haynor drove the double winch, Campbell drove the single forward winch, and the respondent drove the winch at the stern of the vessel.

The winches are operated by steam by means of cables revolving upon drums, and which run through blocks attached to the ship's mast. In order to load a heavy piece of machinery, it became necessary to put all the winches in operation. To this end, the first officer, according to witness Haynor, gave an order "to double up and get a block as quickly as possible." Witness Campbell said the order was "to double the falls in order to lift the load." And again he said it was to "make fast everything and to double up." The respondent said the order was "to get a block and double up; to connect it up to the mizzenmast." Again he said it was "to belay everything and make it [the block] fast, and he told me to make a couple of straps." The first officer testified that his order "to the sailors" was "to get up a gantline . . . and take it aloft and reeve it through the gantline block and send it down in order to lift up a cargo block to fix at the mast head." The order was general to all the sailors, and while they do not tell it in the same words, it meant for them to quit other things and connect up the single winches as soon as possible, so that the heavy piece of machinery might be put aboard, it being the last piece to be loaded. The witness Haynor, in obedience to the order, took a pulley block and a lifting line up to the cross-trees on top of the mast, and rove the line through the block, and let it fall for the purpose of taking up the cargo block. The line fouled at the goose neck of the boom. The respondent stepped onto the

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"gypsyhead" or the "niggerhead," otherwise called the "fleet-ing drum" of the forward single winch, reached for the line, and the lever to the winch, which had been standing at center for about twenty minutes, fell and the winch started. The respondent was caught in the bight of the cable, thrown to the floor, and injured by the revolving drum. The respondent, in detailing the situation and in explaining why he did not step on the metal-covered cog wheels, said:

"Mr. Haynor was on top leaving the gantline down, and I had to take a pulley or snatch block down. We always take a gantline down and send it on to pick up heavy things like that. And he was on top and Mr. Marquette was on the other side there; and he was leaving that gantline down to me and that was the only place to get it. There was a big steam launch on the deck right there and there was gasoline drums on top of this right here, the height of this was eighteen inches or two feet high, and the gasoline drums were right on the top, and they are four or five feet high, and this is the only place here that I could stand, right here below; I could not get at it and the wind was blowing and he was trying to get it down, and he was getting it tangled between the two booms, and the only way I could get it was to get on the gypsyhead, so I stepped up there with my left foot that way, and my right foot that way, and the lever was over here, and the lever fell down, and my foot got jammed up in this and I was thrown over."

In answer to the question, "You say there were gasoline drums there on the deck?" he answered, "Yes, there were gasoline drums, and a steam launch and a lot of lumber and everything. We had a big deck load; it was over everything." Other witnesses gave like testimony. Respondent testified that he had operated the winch a short time in the forenoon, but that he did not set the lever. He further said that he did not know whether the steam was on or off when he stepped upon the winch. He said he knew that, if the steam was on and the lever fell, the winch would start; that he did not look, but obeyed orders. He said, if the clamp and set screw which held the lever in place were right, the lever

would stand. A witness for the appellant, a machinist, said that one could not tell by looking whether the steam was on or off, unless the steam was escaping, and that it would not escape if the winch was right. Witness Campbell testified that the winch was defective, and that the set screw which is designed to hold the lever was in disrepair. The respondent's witnesses united in saying that, owing to the crowded condition of the deck, the respondent took the only practicable way of reaching the gantline.

The negligence charged is, (a) that the clamp and set screw which were designed to hold stationary the lever which operated the winch were defective; (b) that the appellant should have had the steam turned off the winch or should have left Campbell, the tender of the offending winch, at his post; and (c) that the appellant failed in its duty to use reasonable care to furnish the respondent a reasonably safe place to work, and failed to use reasonable care to furnish reasonably safe instrumentalities.

The appellant denied each charge of negligence, and alleged affirmatively, (a) that the respondent was guilty of contributory negligence; (b) that he assumed the risk; and (c) that his injury was caused by the negligence of a fellow servant. At the close of the respondent's case, the appellant moved for a nonsuit, which the court denied.

The appellant now contends, (1) that the evidence did not warrant the jury in inferring its negligence; (2) that the respondent was guilty of contributory negligence; (3) that he assumed the risk; (4) that he voluntarily chose an unsafe way when there was a safe way at hand; (5) that his injury was caused by the negligence of a fellow servant; (6) that the case is controlled by the industrial insurance act; (7) that the court erred in giving certain instructions to the jury; and (8) that the verdict is excessive. These propositions will receive consideration in the order stated.

(1) In respect to the negligence of the appellant, it is familiar law that it is the duty of the master to use reason-

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able care to furnish the servant with a reasonably safe place to work. A like duty devolves upon the master in respect to the instrumentalities which are furnished for the servant's use. Whether the appellant met this duty is a question of mixed law and fact, and hence presents a question for the jury. If the clamp and set screw were defective and the appellant knew it, or if, in the exercise of reasonable care, it ought to have known it, and it failed to warn the respondent of the danger or to take reasonable precautions to prevent his injury, it was guilty of negligence. It claims that the instrumentalities were not defective, and that it had had the winch repaired by competent workmen about two weeks before the accident. The clamp and set screw were designed to hold the lever stationary. This they failed to do. The witness Campbell testified that they were defective. If his testimony is true, it shows that the winch had not been carefully repaired. What is reasonable care in a given situation is a question of law only where but one conclusion may be drawn from the evidence. If different minds may honestly reach different conclusions, the question is for the jury. *Thoresen v. St. Paul & Tacoma Lumber Co.*, 73 Wash. 99, 131 Pac. 645, 132 Pac. 860; *Wainwright v. United States Lumber Co.*, 73 Wash. 222, 131 Pac. 820. While the question is a difficult one, we are constrained to hold that the court was warranted in submitting it to the jury.

(2) The same principle applies to contributory negligence. *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833.

(3) The appellant concedes that the court correctly instructed the jury on the question of assumed risk, but insists that, the respondent being an expert winchman, and the winch being "open, uncovered and capable of complete examination," the respondent was guilty of negligence as a matter of law in stepping upon the "fleeing drum" of the winch "without any order and of his own volition," citing, among other cases, *O'Dell v. Northern Coast Timber Co.*, 63 Wash. 546, 115 Pac. 1085, and *Cole v. Spokane Gas & Fuel*

Co., 66 Wash. 393, 119 Pac. 831. In the *O'Dell* case, the plaintiff was ordered by the foreman to flag an approaching train. There was a wire cable lying across the railroad track. The plaintiff took a position near the cable but on the opposite side from the train, and gave the signal. The signal was not heeded, and the moving train caught the cable, causing it to strike and injure the plaintiff. Upon these facts, we held that the plaintiff voluntarily took a position so obviously dangerous that he could not recover. In the *Cole* case, the plaintiff dropped a pan filled with coke, and was injured. He testified that the handle of the pan slipped in his hand. The evidence showed that he carried the pan many times a day. We held that, the pan being a simple instrument, it was the duty of the servant to know its condition and either have it repaired, if repairs were necessary, or report the disrepair to the master. It is apparent, we think, that there is little analogy between those cases and the case at bar. The respondent had operated the winch only a short time, and had not set the lever. He had a right to assume that the lever and set screw were in proper condition, and that the winch would remain stationary until some one set it in motion. He did not know whether the steam was on or off. A witness for the appellant said that one could not tell by looking whether the steam was on or off of the winch. The question was properly submitted to the jury.

(4) The testimony does not tend to show that the respondent voluntarily chose an unsafe way in attempting to get the line when a safe way was at hand. It shows, on the contrary, that he chose the only practicable way in view of the surrounding conditions. Moreover, it shows that he followed the usual and customary way. It is suggested in the briefs that he should have stepped upon the large metal-covered cog wheel, and that this would have been a safe way. He testified that he could not have reached the line from that position. Other witnesses said that he could not have stood on the rim of the cog wheel, because there was nothing for

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him to hold on to while reaching for the gantline. Before hearing the testimony, upon stipulation of counsel, the jury was sent to inspect the ship, the machinery of which was admittedly in the same situation as when the accident happened. The jury, therefore, had an opportunity to test the truth of the respondent's testimony from their own observations.

(5) There is no evidence that the injury was caused by the negligence of a fellow servant. However, if the negligence of the master concurred with the negligence of a fellow servant in causing the injury, the master is liable. *Hanson v. Columbia & Puget Sound R. Co.*, 75 Wash. 342, 134 Pac. 1058.

(6) The contention that the cause falls within the industrial insurance act cannot be sustained. The appellant neither alleged nor proved that it had complied with the act. Indeed, it did not suggest in the court below that it fell within the protection of that law. *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370; *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681.

(7) The court, among other things, instructed the jury that the duty of the master to use reasonable care to furnish the servant with a reasonably safe working place is a non-delegable one. It also instructed that, as a matter of law, the appellant knew of all the defects in the winch which the exercise of reasonable care upon its part would have disclosed. We cannot, within the reasonable limits of an opinion, review the appellant's several objections to the instructions; nor can we set forth the instructions, or their substance, further than to say that, taken as a whole, they voice the view we have expressed.

(8) The last contention is that the verdict was excessive. There is no conflict in the testimony as to the nature and extent of the injury. The respondent suffered a compound fracture of the right leg near the ankle. Both bones were broken, and the knee was dislocated or the large ligaments

were torn loose. He was in the hospital about seven months, used a crutch thereafter for three months, then a cane for four or five months. He was unable to work for about twenty months, and had done nothing but very light labor at the time of the trial. His leg was cut open and the bones were scraped three or four times while he was in the hospital. He testified at the trial that he could not use his leg to any extent on account of the condition of his knee, and that he could not work as a sailor. He was thirty-eight years of age and earning on an average \$80 a month with his board, when he was injured. He had a life expectancy of approximately twenty-nine years. The verdict and judgment were for \$5,000. Dr. Underwood testified that, at the time of the trial, twenty-one months after the injury, the knee was "quite bent and he cannot bear the weight of the body on the bended knee now," that it would take years "for full recovery," that there will always be a weakness in the knee under any great strain, and that the disability to a certain extent is permanent. Dr. Cook, in answer to an inquiry as to how much time would elapse before the respondent could resume heavy manual labor such as a sailor is required to perform, or whether he would ever be able to perform such labor, said, "He is not able to use it [the leg] in hard work now, and it is very problematical how long it will be." He was asked, "Under the most favorable circumstances, how long would it be before he would have the full use of it as to strength?" and answered, "At the rate he is recovering, I should judge it would be a year or more before he can do any work as a sailor." Upon this testimony, we do not feel justified in disturbing the verdict.

The argument has taken a wide range, and other questions are suggested which are closely correlated with those already considered. We do not think they merit special consideration. The judgment is affirmed.

CROW, C. J., ELLIS, CHADWICK, and MAIN, JJ., concur.

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Syllabus.

[No. 11967. Department One. August 10, 1914.]

**HJALMER LINDQUIST, by his Guardian etc., et al., Appellants,
v. PACIFIC COAST COAL COMPANY, Respondent.¹**

TRIAL—PROVINCE OF COURT AND JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE. The fact that the testimony of a witness called by plaintiff is not in entire harmony with his theory of the case does not warrant the granting of a nonsuit, since it is the province of the jury to weigh and harmonize it, if possible, or accept or reject it, considering all the facts and circumstances of the case.

MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—CHANGING CONDITIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE. An employee in a mine is not guilty of contributory negligence nor does he assume the risks from changing conditions therein, where, upon discovering signs of a squeeze in the roof of the mine, he quit working at that place, but upon assurance of the foreman that the place was safe, resumed his work, and a few hours later the roof fell, killing the employee.

SAME—FELLOW SERVANTS—FOREMAN AS VICE PRINCIPAL. In such a case, the foreman, having authority to direct the work in the mine, is a vice principal and not a fellow servant.

MASTER AND SERVANT—METHOD OF WORK—TIMBERING MINE—STATUTES—CONSTRUCTION. The owner of a mine is not negligent in failing to provide for cribbing instead of supporting the roof with posts and caps, or from the fact that the timbers furnished were placed two hundred and fifty feet away from the working place, no contention being made that sufficient timbers were not furnished in compliance with Rem. & Bal. Code, § 7394, from which cribs could have been made had the workmen been disposed to so use them, the statute fixing the place of delivery "at the entrance to the working place" and no objection being made that sufficient timber was not in place, it further appearing that the method of timbering the mine had been employed for twenty years, the plaintiffs' evidence going no further than to indicate that, if cribbing had been used, the accident would not have happened.

SAME—METHOD OF WORK—COAL MINING—QUESTION FOR JURY. Whether a coal miner, killed by the falling of the roof in a mine, assumed the risk where the chute on one side of the section in which he was working had caved in and was out of use, and whether it was proper mining to remove the coal from one side of

¹Reported in 142 Pac. 445.

the section to the other so as to leave no natural support for the roof, are questions for the jury, the measure of duty being defined by the statute, and not by the common law.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 31, 1914, upon granting a nonsuit, dismissing an action for the wrongful death of a coal miner, killed by a falling roof in a mine. Reversed.

S. A. Keenan, for appellants.

Farrell, Kane & Stratton and *Stanley J. Padden*, for respondent.

CHADWICK, J.—This action was brought by the infant sons of Matt Lindquist, to recover damages on account of the death of their father, which occurred in the coal mine of the defendant. The method of mining was to open chutes so as to divide the coal seam into pillars. These chutes were ten feet wide and were driven up the vein from the main gangway at right angles thereto and about thirty-five feet apart. These pillars were divided into rooms or sections by driving cross cuts four feet wide from chute to chute every sixty feet, each section being, therefore, thirty-five by sixty feet. Each chute was divided by timbers into two parts, the one being used as a chute for running the coal out of the mine and the other as a man way.

Lindquist and his partner were experienced miners, and had been working in the section where the accident occurred for some time. The chute on the right-hand side of the section had caved and was out of use, so that it was necessary to bring all of the coal out of the left-hand chute. The miners had, in consequence, began at one side of the section and were mining it over to the other side. It was the custom in that mine to timber with uprights or props, with caps to support the roof. On the afternoon before the accident occurred, Lindquist and his partner observed some evidences of a squeeze in the upper right-hand corner of the section.

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They accordingly quit working at that point. The next morning, at about eight o'clock, the mine foreman, whose duty it was to inspect the work from time to time and to look after the safety of the men, came in and inspected the place that Lindquist and his partner had believed to be dangerous on the night before. It was the judgment of the foreman that the place was safe, and he accordingly ordered the miners to proceed and take out the coal. They did so, timbering as the work progressed toward the corner of the section. While thus engaged, at somewhere between half past twelve and two o'clock in the afternoon, the roof squeezed and Lindquist was killed.

The case is predicated upon several charges of negligence. It was brought to trial upon general denials and affirmative defenses charging contributory negligence and assumption of risk, and that the plaintiff's intestate and the foreman were fellow servants. When the plaintiffs had rested their case, the court entertained and allowed a motion for a nonsuit. From a judgment of dismissal, this appeal is prosecuted.

The court, in passing upon the motion for a nonsuit, was of opinion that the testimony of one of the witnesses called on behalf of the plaintiffs exonerated the defendant from all blame. We have read the testimony of the witness and, without reviewing it, we are satisfied that it will not bear the construction put upon it by the trial judge. Admitting that it is not in entire harmony with plaintiffs' theory of the case, it is, nevertheless, no more than the testimony of one witness. It was the province of the jury to weigh and harmonize it, if possible, or to accept it or reject it, as they saw fit, considering all the facts and circumstances of the case.

It is urged that, although the deceased would have been justified in following the judgment of the foreman, under the rule announced in *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231; *Christiansen v. McLellan*, 74 Wash. 318, 133

Pac. 434; *Lamoon v. Smith Cement Brick Co.*, 74 Wash. 164, 132 Pac. 880; *Olson v. Carlson*, 74 Wash. 39, 132 Pac. 721; that, nevertheless, the lapse of time between eight o'clock and about two o'clock in the afternoon was such, and especially so when taking into consideration the constantly changing situation, that the case is exempted from that rule, and deceased must be held to have assumed the risk or was guilty of contributory negligence.

It is an undoubted rule that, where the place of work is being constantly changed as the work progresses, as in the construction of buildings and the like, a workman will be held to have assumed the risks incident to his labors; but this rule is not without a very important and reasonable exception. It often happens, in the prosecution of a particular piece or kind of work—as for instance, mining—that the safety of the place will become an object of inquiry calling for an expression of judgment. We have held repeatedly in such cases that a workman who follows the assurance and judgment of the master will not be charged with an assumption of risk or be held to be guilty of contributory negligence as a matter of law. The reason is obvious. It inheres in the very doubt that called for the original inquiry. The assurance is not that one blow may be struck or one shovel full of earth may be turned in safety, but that it is safe to remain in the questioned situation long enough to accomplish the thing to be done, which in this case was to remove the coal from that part of the pillar where the squeeze occurred. The foreman, and consequently the master, is charged with knowledge that it would take time, possibly hours of time, to do the things he said could be safely done. Now, when the workmen proceeded in the usual and customary way, propping the roof with posts and caps as they went, they should not be charged; for the assurance of the foreman implied that they should do the work safely in the way adopted in that particular mine. Certain Colorado cases are cited which hold a contrary rule. They are not in harmony with

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our own decisions, in that a foreman exercising his judgment in the presence of the men and concurrent therewith is there held to be a fellow servant (*Poorman Silver Mines of Colorado v. Devling*, 34 Colo. 37, 81 Pac. 252); whereas, this court has consistently held that a foreman having authority to direct the work is a vice principal. It will not be decided, as a matter of law, that a workman who has followed the judgment of the master or his vice principal is guilty of contributory negligence, unless the situation was so manifestly dangerous that a man of ordinary prudence, in the exercise of due caution, would refuse to obey. *Knudsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27; *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832; *Lamoon v. Smith Cement Brick Co.* and *Olson v. Carlson*, *supra*.

The next contention of the appellants is that defendant used an improper and dangerous method of mining, in that it did not provide for cribbing instead of posts and caps; and in that it did not keep the chutes open on both sides of the section being worked so that coal might be removed from each side of the section, or first from one side and then from the other. Whether it was the duty of the master to provide timber for cribbing under the circumstances developed by the testimony, may well be questioned. As we read the record, the mine of the defendant was not what is called an unsafe mine. The method employed, as testified to by witnesses who have been familiar with the mine for more than twenty years, is to support the roof with props or posts, with caps. The duty of a master is to meet those conditions which suggest danger to men of ordinary prudence and judgment. The testimony goes no further than to indicate that, if cribbing had been used, the accident would not have happened. Such testimony is always given in the light of what has occurred, and is of little value in determining whether, when considering the character of the ground being worked and the past history of the mine, the squeeze should have been anticipated and guarded against by crib-

bing instead of props. The law is that the owner shall keep a sufficient supply of timber where the same is required for use as props so that the workmen may be at all times able to properly secure the roof from caving in. Rem. & Bal. Code, § 7394 (P. C. 345 § 139). We think that defendant met this duty within the letter of the statute and *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, and *Druglis v. Northwestern Imp. Co.*, 41 Wash. 398, 83 Pac. 101. It does not seem to be contended that defendant failed to supply enough timber to make cribs if the workmen had been disposed to use them, but that the timber was placed at such a distance from the working place that the miners could not erect them and make any money at the rate agreed upon between the miners' union and the defendant owner. The union must have fixed or agreed upon the schedule of compensation, having in mind the fact that the mine could be worked safely without taking time to crib the ceiling as the work progressed. Nor do we think that defendant should be held to be negligent in that the timbers furnished were placed at about two hundred and fifty feet away. The statute, § 7394, *supra*, provides that the timbers shall be delivered "at the entrance to the working place." What the entrance to the working place may be is to be explained by testimony in every case, but when explained it may become a question to be decided as a matter of law. The statute does not fix a distance but a place. Neither does it appear that the workmen, one of whom survives and was a witness, objected in any way because sufficient timber was not in a proper place. We are satisfied that defendant was not negligent in this regard.

Whether it was proper mining to remove the coal from one side of a section to the other so as to leave no natural support across the whole face of the roof, is, we think, a proper question for the jury. Neither would the fact that the chutes to the one side of the section had caved in bind the workmen to an assumption of risk or make them guilty of contributory negligence. At common law, they no doubt

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would be so charged. The present measure of duty is that of the statute. Labor statutes are passed to cure the rigors of the common law rule. *Pachko v. Wilkeson Coal & Coke Co.*, 46 Wash. 422, 90 Pac. 436; *Green v. Western American Co.*, *supra*; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915. The coal mine act is drawn with a sole purpose to insure safety in method and manner of mining, and courts cannot be less liberal in the interpretation of such statutes than the spirit of the law demands.

Whether the danger was so obvious that a man of ordinary prudence in the exercise of due caution would have refused to obey the direction of the foreman, and whether the manner of removing the coal from the section in the way in which it was removed was a negligent way, are issuable facts to be determined by a jury.

For the reasons assigned, the case is reversed and remanded with directions to take the verdict of a jury.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11983. Department Two. August 10, 1914.]

DOROTHY HAWKINS, *Appellant*, v. FRANK REBER,
Respondent.¹

JUDGMENT—RES JUDICATA—BAR—MATTERS CONCLUDED. In a prior action on contract in which the issue was as to whether there had been a complete settlement of differences prior to the bringing of the action, and the court found that such was the case, and no appeal was taken therefrom, the judgment therein is *res judicata* and a bar to a subsequent action between the same parties for a recovery upon *quantum meruit*, in which the same issues were involved as in the former action.

Appeal from a judgment of the superior court for King county, Irwin, J., entered July 30, 1913, in favor of the defendant, upon the pleadings, in an action on contract. Affirmed.

¹Reported in 142 Pac. 432.

Alfred Gfeller, for appellant.

Williamson, Williamson & Freeman, for respondent.

MOUNT, J.—The plaintiff brought this action to recover the alleged reasonable value of services rendered by the plaintiff to the defendant between September 1, 1899, and May 1, 1910. The amount claimed is \$9,600, and legal interest thereon. The defendant answered the plaintiff's complaint and denied generally the allegations thereof. For a first affirmative defense, the defendant pleaded a prior action between the parties as a bar to this action. For a second affirmative defense, the defendant alleged that, on the 2d day of May, 1910, the plaintiff and the defendant settled all their differences, and in consideration of that settlement, the defendant paid to the plaintiff \$1,200, in full settlement of all claims against him. The plaintiff replied, admitting the former action and the judgment therein, as alleged in the first affirmative defense, but denied that that judgment was a bar to the present action. The plaintiff also admitted the receipt of the \$1,200 as alleged in the second affirmative defense, but alleged that that money was paid to the plaintiff as consideration for the execution of certain deeds. The plaintiff also denied that there had ever been any settlement or compromise of the claim upon which the action was founded. Attached to the defendant's answer, is a copy of the original complaint, answer, reply, findings of fact, and the judgment of the trial court in that action between the same parties. After the plaintiff had filed her reply, the trial court sustained a motion for judgment on the pleadings, and dismissed the action. The plaintiff has appealed.

But one question is presented in the briefs, and that is, whether or not the prior action is *res judicata* and a bar to this action. The appellant argues that the first action was based on a contract of partnership between the parties, and that this action is for the reasonable value of services ren-

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dered during the same period of time, and that the former suit upon an express contract is not a bar to the second suit upon a *quantum meruit* for the same services when it takes different evidence to establish it. *Budress v. Schafer*, 12 Wash. 310, 41 Pac. 48; *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; and *Egbers v. Fischer*, 73 Wash. 308, 131 Pac. 1128, are cited to sustain this position.

It is probably true that, where the plaintiff alleges an express contract, and fails to prove such a contract, and the suit is dismissed for that reason, an action upon a *quantum meruit* may be afterwards maintained. But in this case, an inspection of the pleadings in the former action shows that the respondent in this action (the defendant in that action) not only denied the partnership, but as an affirmative defense, alleged that, prior to the beginning of that action, and on May 2, 1910, the plaintiff and the defendant, by mutual agreement, settled all matters of difference between them, and in consideration thereof the defendant executed and delivered to the plaintiff his check for \$250, and 19 promissory notes for \$50 each; and thereafter delivered to the plaintiff certain articles of personal property. That allegation was denied in the original action, and was one of the main issues tried in that case. After hearing all the evidence, the court found, as a fact, that, on the 2d day of May, 1910, the plaintiff and the defendant, by mutual agreement settled all matters of difference between them, and that the defendant paid to the plaintiff the sum of \$1,200 in consideration thereof, and that "it was understood and agreed between the parties at said time that said settlement was a full and complete settlement and adjustment of all the differences between the plaintiff and defendant. . . . That the plaintiff and defendant fully settled and adjusted all matters of difference between them on May 2, 1910, prior to the commencement of this action."

As stated by us in *Olson v. Title Trust Co.*, 58 Wash. 599, 109 Pac. 49:

"The rule is that, in an action between the same parties, a judgment therein is *res adjudicata* as to all points in issue, and also all points which might have been raised and adjudicated."

To the same effect, see, *McPherson Bros. Co. v. Okanogan County*, 61 Wash. 239, 112 Pac. 267; *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427; *Thompson v. Washington Nat. Bank*, 68 Wash. 42, 122 Pac. 606, 39 L. R. A. (N. S.) 972. We think this rule is conclusive of this case. It is admitted in the pleadings that the issue upon a former trial between the same parties was whether or not there had been a voluntary and mutual settlement of all the differences between them prior to the bringing of that action. The court, upon trial of that issue, as stated above, found as a fact that there was a "full and complete settlement and adjustment of all differences" between the parties. That judgment was unappealed from. The time for appeal has long since gone by. It was a final adjudication of the differences, and *all the differences, between the parties up to that time*. The trial court in the former action based its judgment upon this settlement. It is plain, therefore, that the former action is a complete bar to the cause of action alleged in the complaint in this action.

The judgment is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

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[No. 12004. Department Two. August 10, 1914.]

ALBERT PRICE, *Respondent*, v. WENATCHEE VALLEY
ORCHARDS COMPANY, *Appellant*.¹

DEPOSITIONS—ANSWERS—SUFFICIENCY. An objection to depositions for the reason that answers thereto were incomplete, and in certain instances referred to the number of another interrogatory of similar import in which the answer there made was to be the answer to the one in question, is properly overruled, where it appears that the facts can be ascertained from the deposition when read as a whole, and that no attempt was made by the witness to evade the questions or withhold material facts known to him.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD. A vendee is entitled to rescind a contract for the purchase of real property on the ground of the vendor's fraud in representing that he had title to the land, that it was practically level, that he had installed a pumping plant sufficient to properly irrigate the land, and that a society had been formed by persons purchasing land from him for the purpose of protecting any purchaser in event of his inability to make payments as provided in his contract, where the record amply sustains the court's findings that the representations were false and the inducing cause of the contract, and clearly sufficient to rescind the contract.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered July 17, 1913, upon findings in favor of the plaintiff, in an action for rescission, tried to the court. Affirmed.

Sam R. Sumner, for appellant.

Reeves, Crollard & Reeves, for respondent.

MORRIS, J.—Appeal from a judgment rescinding a contract for the purchase of real property, upon the ground of fraud. The respondent resided at Chicago. The appellant was engaged in the sale of lands about five miles north of Wenatchee. The contract was entered into at Chicago, respondent never having seen the lands nor having any knowledge of their character or adaptability for orchard pur-

¹Reported in 142 Pac. 434.

poses, except as represented by the agents for appellant. The inducing representations, which the lower court has found to have been falsely and fraudulently made, were (1) that the appellant had title to the land; (2) that the land was practically level; (3) that the appellant had installed a pumping plant sufficient to properly irrigate the land; and (4) that there was a society formed by persons who had purchased lands from appellant for the purpose of protecting any purchaser in the event of his inability to make payments as provided in his contract. That these representations were false, can hardly be doubted, the record amply sustaining each finding. That, if false and the inducing cause in the contract, they are sufficient to rescind the contract is equally clear. The facts preponderating in respondent's favor, and the law unquestionably affording him relief, there is nothing more to be said, unless we enter upon a recital of the facts shown in the record to sustain the findings, which is unnecessary.

Much of the testimony was taken by deposition at Chicago. Counsel for appellant objected to the reading of these depositions in evidence, because of the character of certain answers made to some of the cross interrogatories in which the answer appears as "Answer to No. —," giving the number of an interrogatory of similar import in which the answer made would be an answer to the interrogatory in question. In other cases counsel contends the answer is not as full as the question demanded. We think, in each instance, all the facts sought to be elicited can be ascertained from the deposition, when read as a whole, and this is all that is required; and that in no case does it appear that the witness was attempting to evade the question or withhold material facts within his knowledge, which must appear before the court would be justified in refusing to accept the deposition. 13 Cyc. 998.

It is also contended that the disaffirmance of the contract was not sufficiently prompt. We do not find this objection to

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be well taken. Such an attack must be determined from the peculiar facts as each case presents them. Respondent acted with sufficient promptness, on the discovery of the fraud, to entitle him to his relief.

The judgment is affirmed.

CROW, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 11537. Department One. August 11, 1914.]

J. E. WOODARD, *Respondent*, v. CLINE LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—INJURY TO SERVANT—FACTORY ACT—PLEADING—COMPLAINT—SUFFICIENCY. In an action by a shingle sawyer, brought under the factory act, for injuries sustained through coming in contact with the jointer saw while adjusting a set screw which controlled the tipper table, the complaint is not defective in that it fails to allege any duty to be performed that would make an injury probable, or that the employee was liable to come in contact with the unguarded saw, where it alleged that "It was one of the duties of the plaintiff to adjust said tipper table to said shingle saw for it to properly perform its work," etc., followed by facts showing the duty to be performed, and that plaintiff was "liable to come in contact" with the edge of the saw while adjusting the set screw which controlled the tipper table.

APPEAL—REVIEW—VERDICT. A finding by the jury on conflicting evidence that the plaintiff was in the employ of defendant at the time of an accident, will not be disturbed on appeal.

MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED SAW—SCOPE OF EMPLOYMENT. The claim that plaintiff, a shingle sawyer, who, during the noon hour, placed a new block upon the tipper table, was acting without the scope of his employment, is immaterial in an action for injuries sustained by him through contact with the saw while adjusting a set screw controlling the tipper table after such repairs were made, there being abundant evidence to show that, had the repairs been made by the millwright employed to make needed repairs, the adjustment would have been necessary by the sawyer after the machine was set in motion.

¹Reported in 142 Pac. 475.

SAME—METHODS OF WORK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A shingle sawyer is not guilty of contributory negligence, as a matter of law, in attempting to adjust a set screw controlling the tipper table while the machine was in motion, where the evidence was in conflict concerning the location of the set screw with reference to the jointer saw upon which he was injured, and the consequent necessity for a guard, and witnesses testified that the manner in which he attempted to make the adjustment was customary and proper.

APPEAL—HARMLESS ERROR—INSTRUCTIONS. Error cannot be assigned on the refusal to give instructions covered in the general charge.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for personal injuries is not excessive where plaintiff, a skilled shingle sawyer, twenty-nine years of age, and capable of earning from \$3.25 to \$4.50 per day, sustained the loss of the fingers of his left hand, which will interfere with the pursuit of his former calling, or any other requiring physical labor with his hands, and the evidence shows that he had not the education or qualifications for employment not involving physical labor.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial will not be granted for newly discovered evidence which, if given, would only be cumulative, and there was no sufficient showing of diligence to secure the same prior to the close of the trial.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered January 24, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a sawyer in a shingle mill. Affirmed.

Craven & Greene, for appellant.

J. B. Abrams and Romaine & Abrams, for respondent.

MAIN, J.—This action was brought under what is known as the "Factory Act," for the purpose of recovering damages on account of personal injuries alleged to be due to the negligence of the defendant. The cause was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff in the sum of \$5,892.80. A motion for judgment notwithstanding the verdict was interposed and

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denied. Upon considering the motion for a new trial, the court entered an order granting a new trial, unless the plaintiff elected to accept a judgment for \$5,000. The verdict as reduced was accepted by the plaintiff. From the judgment entered for this amount, the defendant appeals.

The Cline Lumber Company, a corporation, was the owner of a shingle mill, located at Sumas, Washington, and one Horace Cline was its manager. In this mill, were operated five shingle saws, one of which was designated, "No. 3." The room in which these saws were located was adjacent to the room occupied by the filer.

For some days prior to the 27th day of March, 1911, one L. D. Smith had been the operator of saw No. 3. This machine, like other shingle saws, had two saws, one known as the "shingle saw," and the other as the "jointer saw." These saws were supported by a frame, and were at right angles to each other. Between the edge of the jointer saw and the side of the shingle saw, was what is known as the tipper-table. The purpose of this was to catch the shingles as they dropped from the block. The operator stood in front of the jointer saw. Between him and this saw, was what is known as the "knee-board" or "gate." This knee-board was of dimensions approximately corresponding to the diameter of the jointer saw, and was for the purpose of protecting the operator from injury by the saw. At the left of the operator, and near the end of the knee-board, was a bolt within a wire spring. This bolt regulated the contact of the tipper-table with the side of the shingle saw. The tension of the spring was released or increased by turning the burr on the end of the bolt.

Smith, who had been operating this saw, desiring to be away for a few days, brought the respondent to the mill on the morning of the 27th day of March, 1911, to operate saw No. 3 during his absence. When they came to the mill on this morning, just prior to the starting thereof, they met the filer. The plaintiff, when asked what purpose he had in

being there, said that he came to work a few days if there was no objection. Whereupon the filer responded, in effect, that he had no objection. Saw No. 3 on this day was operated until the noon hour by the plaintiff. After eating his lunch, the plaintiff placed upon the tipper-table a new block, which he made from a piece of an old box taken from the filer's room. After the mill started and the machine was thrown into gear, the friction of the tipper-table with the shingle saw caused a roaring sound, which indicated that the contact was too close. The plaintiff, without stopping the machine, attempted to adjust this by turning the burr upon the bolt, and thus release the tension of the spring which regulated the contact of the tipper-table with the saw. In doing this, he grasped the tipper-table with his right hand and reached under his right arm with his left hand, grasped the burr, and gave it a turn to the right. As he did so his hand came in contact with the edge of the jointer saw, and he suffered the injury for which he complains.

According to the evidence on behalf of the plaintiff, the edge of the jointer saw ran within approximately one inch of the bolt. The burr was back of the knee-board. According to the evidence introduced on behalf of the defendant, the edge of the jointer saw was two inches or more from the bolt and the burr was on the outside, or flush with the outside of the knee-board. The defect complained of was the failure to have a guard between the edge of the jointer saw and the bolt and burr. If the burr upon the bolt was on the outside, or flush with the outside of the knee-board, it is obvious that no guard would be necessary, as the knee-board would operate as a guard. But if the burr was back of the knee-board, as claimed by the plaintiff, and the edge of the saw ran within one inch of the bolt, a guard was necessary to protect the operator from injury when attempting to adjust the tipper-table.

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By reason of the injury, the plaintiff sustained the loss of his first finger at the knuckle-joint, leaving no stub or stump. Of the other three fingers, there were stubs remaining varying approximately from one-half of an inch to one inch in length. Other facts will be stated in connection with the consideration of the points to which they may be germane.

After the jury had been impaneled to try the cause and the first witness on behalf of the respondent sworn, the appellant interposed an objection to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. The appellant claimed that the complaint did not allege either any duty to be performed by the employee that would make an injury probable, or that the employee was liable to come in contact with the unguarded saw. Paragraph four of the complaint alleges that, "it was one of the duties of the plaintiff to adjust said tipper-table to said shingle saw for it to properly perform its work in connection with the shingle saw in the defendant's said mill." This was followed by facts which show the duty to be performed. The complaint also alleged facts which showed that the operator of machine No. 8 was "liable to come in contact" with the edge of the jointer saw while adjusting the set screw which controlled the tipper-table. The facts stated in the complaint constituted a cause of action under the factory act. Rem. & Bal. Code, §§ 6587-6595 (P. C. 291 §§ 61-73).

One of the questions in the case is whether the respondent was in the employ of the appellant at the time of the accident. Prior to beginning work, he had had no conversation with any one except the filer, and the filer was without authority to hire or discharge men. Smith testified that, after the respondent had gone to work, he told the manager that the respondent was working on the machine and that he, the manager, said, "that was all right." This conversation is squarely and positively denied by Cline. The question was

submitted to the jury under a proper instruction. Notwithstanding the fact that we may believe that the evidence on this question preponderates in favor of the appellant, we are not at liberty to disturb the verdict of the jury.

The appellant had in its employ a millwright whose duty it was to make needed repairs in and about the mill and machinery. It is therefore claimed that the respondent, in putting the block upon the tipper-table, was engaged in a work beyond the scope of the employment. It is unnecessary to review the facts and circumstances tending to support the respective contentions upon this question, for the reason that the respondent was not injured while repairing the tipper-table. The injury occurred while making the adjustment after the repair work had been completed. There is abundant evidence which justified the jury in finding that, had the tipper-table been repaired by the millwright, an adjustment would have been necessary by the operator of the machine after it was set in motion. The shingle saw while at rest is "dished" or "concave." When in motion, due to the tension which has been given it, it "stands up," and runs true. An adjustment of the tipper-table when the saw was at rest would not have obviated an adjustment after the saw had been set in motion, owing to the change in position of the saw.

It is also contended that the respondent was guilty of contributory negligence in attempting to make the adjustment when his hand would necessarily come within such close proximity to the edge of the rapidly revolving saw. A number of witnesses testified that the manner in which the adjustment was attempted was customary and proper. The question of contributory negligence, like most of the other vital questions in this case, was one of fact and not of law, and was for the jury to determine upon the conflicting evidence.

Error is also sought to be predicated upon certain instructions given, and the refusal to give requested instruc-

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tions. The instructions given covered the law of the case. Nothing more was required. It is not error to refuse to give a requested instruction, even though it correctly state the law, where the same question is covered by an instruction given, though couched in different language.

It is next claimed that, in any event, the verdict, even as reduced by the trial court, is excessive. The respondent, at the time of the injury, was twenty-nine years of age, and was capable of earning from \$3.25 to \$4.50 per day. He was a skilled shingle sawyer. The loss of the fingers from his left hand will seriously interfere with his pursuit of that calling, or any other physical labor that requires the use of both hands. The evidence shows that he has not the education or qualifications for employment which does not involve physical labor. The trial court, after considering the evidence, reduced the verdict to the sum of \$5,000. Under the evidence in the case, a further reduction by this court would not be justified.

One of the grounds upon which the motion for new trial was based was that of newly discovered evidence. Smith, in testifying as to the conversation which he had with Cline wherein the latter said it was all right for the respondent to go to work in the mill, fixed this conversation as of the 27th, and the time when he received his check. Cline testified that the check was delivered on the 25th, which would be the Saturday previous. The check was written by the bookkeeper. During the first day of the trial, Smith testified to his version of the transaction. The bookkeeper resided at Sumas, Washington, a town within the county where the trial took place. No effort appears to have been made to secure her presence at the trial after the testimony of Smith had been given. Upon the hearing of the motion for new trial, affidavits were read which stated that the bookkeeper would testify that the check was given to Smith on the 25th. The trial court held that the showing was not sufficient to warrant the granting of a new trial. In this, there was no er-

ror. The evidence, if given, would only be cumulative, and there was not a sufficient showing of diligence in attempting to secure the testimony prior to the close of the trial.

In the briefs in this case, many authorities are cited upon the various questions presented. A review of these has not seemed necessary. The vital questions in the case are those of fact upon which the evidence was conflicting. These questions have all been resolved by the jury against the appellant.

The judgment will be affirmed.

Crow, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

[No. 11590. Department One. August 11, 1914.]

JOHN FINK, *Respondent*, v. CHARLES E. MARR, *Appellant*.¹

SALES—BREACH OF WARRANTY—WAIVER—ACCEPTANCE. An acceptance of goods sold under a warranty as to quality is a waiver of the right to rescind, but does not waive the right to recover damages for breach of warranty in an action for the price.

SAME—BREACH OF WARRANTY—ACCEPTANCE—PRESUMPTIONS. Failure to notify the vendor of defects in goods sold under a warranty, or offer to return them within a reasonable time after discovering the defects, raises a presumption that the goods received were of satisfactory quality.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 29, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract, after a trial on the merits. Reversed.

C. D. Randall, for appellant.

D. W. Henley, for respondent.

MAIN, J.—The purpose of this action was to recover the sum of \$277.20, the balance alleged to be due for a quantity of apples, sold and delivered. The defendant pleaded a

¹Reported in 142 Pac. 482.

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breach of warranty, and prayed for the recovery of damages in the sum of \$35.15. The cause was tried to the court and a jury. The verdict was for the plaintiff in the sum of \$185.60. From the judgment entered upon the verdict, the defendant appeals.

The facts, so far as necessary to an understanding of the question here presented, are as follows: On the 28th day of October, 1912, the plaintiff sold his crop of apples for that year to the defendant at the price of sixty-five cents per box. The contract of sale was in writing, and contained a warranty that the apples were to be "No. 1 stock with culls thrown out," and should not be smaller than two hundred to the box. Between November 9, 1912, and November 29, 1912, fifteen loads of apples were delivered, each load consisting of about fifty-five boxes. On November 30th, the sixteenth and last load was tendered and refused. Thereafter the present action was instituted.

In addition to the general verdict, the jury, in answering special interrogatories, found (a) that the defendant had made a careful inspection of the apples with a view to determining whether they came up to the quality described in the contract prior to the receipt of the tenth load; (b) that the apples delivered were not of the quality warranted by the contract; (c) that the market value of the apples was sixty cents per box; and (d) that the apples which the defendant refused to accept were not up to the standard warranted by the contract.

The question for determination upon this appeal is one of law. In the instructions, the jury were told that, if the purchaser, during the time the apples were being delivered, made an inspection of them which would advise him that they were not as warranted, and after having obtained this knowledge by the inspection, accepted the subsequent loads of apples tendered without objection, or without notifying the seller that the apples were defective, then, any defect in the apples would be waived. In other words, that an ac-

ceptance of the apples with knowledge of their defective quality and without objection or notice to the vendor, would be a waiver of the vendee's right to rely upon a breach of warranty.

That the term in the contract of sale which provided that the apples were "to be No. 1 stock with culls thrown out," constituted a warranty as to quality, is not controverted. Where goods or chattels are sold with an express warranty as to quality, and the article delivered is inferior to that contracted for, a purchaser by accepting goods offered, waives his right to rescind, but does not thereby waive his right to rely upon the warranty in an action brought against him for the price, or in a suit prosecuted by himself for damages for breach thereof. In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890, the court held that it was error to instruct the jury that, if the defendant retained and used the goods there in question after a knowledge of the defects, without notifying the plaintiffs of such within a reasonable time, it thereby waived its right to recoup for damages. In that case, the subject-matter of the sale was certain fire-brick. The defendant claimed that the brick were not of a quality suitable for the purpose for which they were purchased. It was there said:

"It is undoubtedly true that if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected. Benjamin on Sales (Bennett's Notes, 1888), § 901. It is also true that in such cases a failure to give notice or to offer to return the goods would have an important bearing upon the question of warranty, and would raise a strong presumption that the goods received were of satisfactory quality. *Babcock v. Trice*, 18 Ill. 420; Abbott, Trial Evidence, p. 348. That the vendee may retain the goods without notice, and plead breach of

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warranty, in an action by the vendor for the purchase price, is shown by numerous authorities. [Citing authorities]."

The rule of that case was approved in *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.*, 63 Wash. 550. 115 Pac. 1087, where it was said:

"If we should concede that there was a breach of warranty, the rule is that a failure to give notice, or to offer to return the property within a reasonable time after discovering the defect, operates as a waiver of the right to rescind, and leaves the purchaser only the right to recover or offset damages to the extent of the diminished value of the article."

Failure to complain of the quality of the goods or chattels delivered when their inferiority is discovered, or within a reasonable time thereafter, raises a strong presumption that the complaint of defective quality is not well founded. In 2 Mechem on Sales, § 1811, the author states the rule to be:

"In the ordinary case of breach of warranty, either express or implied, notice of the defect or an offer to return the property to the seller is not in any respect a condition precedent to the buyer's right to maintain an action for the breach of warranty, although, as is pointed out by Mr. Benjamin, his 'failure to return the goods, or complain of the quality, raises a strong presumption that the complaint of defective quality is not well founded.' So, obviously, the buyer is not bound to request the seller to remove the article or to replace it with another, in the absence of an agreement so to do."

This presumption is generally one of fact and not of law. It may be either that the articles tendered are of satisfactory quality or that the right to rely upon the warranty has been waived. The strength of the presumption in a particular case depends upon the attendant facts and circumstances, one of which is the period of time that elapses between the acquisition of knowledge of the defect and the complaint. *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 23 Am. St. 783, 13 L. R. A. 224; Williston, Sales, § 488.

The giving of the instruction complained of was error. For this reason, the judgment will be reversed and the cause remanded for a new trial.

Crow, C. J., Gose, Ellis, and Chadwick, JJ., concur.

[No. 11791. Department One. August 11, 1914.]

PAUL CUNNINGHAM *et al.*, Respondents, v. W. L. WEEDIN
et al., Appellants.¹

HIGHWAYS—OBSTRUCTIONS—RIGHTS OF ABUTTING LANDOWNER. Abutting owners may maintain an action for the removal of an obstruction in a highway.

ADVERSE POSSESSION—PROPERTY SUBJECT—LAND FOR HIGHWAY. Title to unused portions of a highway established along a section line but not laid out on the ground cannot be acquired by adverse possession, where the line of travel followed the line of least resistance along a route laid out by volunteers, the road had been used since first laid out, and it was generally understood that the road would be opened when the county was able to do so.

HIGHWAYS—ESTABLISHMENT—OPENING AND USER—ABANDONMENT. Where a highway was established along a section line but not laid out on the ground, but the line of travel followed the line of least resistance along a route laid out by volunteers, the county acquires an easement in the highway in trust for the public, and can later change the line of travel to the true line, in the absence of circumstances creating an estoppel.

BOUNDARIES—MONUMENTS—GOVERNMENT CORNERS—LOCATION—EVIDENCE. The evidence is sufficient to show the existence of a quarter section corner as located one hundred and five feet west of a true north and south line between two sections, where there was positive testimony of plaintiffs' witnesses, who had lived in the locality many years, that they had knowledge of such quarter corner, it having been pointed out to some of them, while others testified to the location of a cemetery and certain other lands by reference thereto, the only testimony in opposition thereto being of a negative character.

Appeal from a judgment of the superior court for Island county, Ralston, J., entered October 9, 1913, upon findings

¹Reported in 142 Pac. 453.

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in favor of the plaintiffs, in an action to restrain obstruction of a road. Affirmed.

James Zylstra, for appellants.

Dan W. Locke and *Dan W. Craddock*, for respondents.

CHADWICK, J.—Prior to the year 1893, the people residing in the vicinity of the road which has become the subject of this controversy, undertook to lay out a road along the section line between sections 17 and 18, township 29, north, of range 8, east, in Island county. The road is what the witnesses call a volunteer road. It was put through the timber by the labor and at the expense of those who were interested in it as a way of travel. In 1893, all of the people in that neighborhood, including defendant W. L. Weedon, petitioned the county commissioners to lay out and establish a county road along the section line. The county commissioners ordered the road established, but the county being without funds at that time, the road was not laid out on the ground, but was traveled along the route laid out by the volunteers, it being generally understood that the road would be opened when the county was able to do so. Some of the witnesses described the road as having kinks and turns. Men who worked on the road said that they had no way to remove rocks and stumps, or to cut down hills, or to bridge low places, and that they went against the lines of least resistance. While there is a dispute as to the section line, to which we shall presently refer, it is certain that the road did not follow a true north and south line between the premises of the parties to this action. In 1913, the road supervisor undertook to straighten the road and put it upon the section line. In so doing, he encroached upon a part of the lands enclosed by the defendants, which lands have been enclosed for many years, first by a brush fence, then by brush fence with wire, and finally by boards with wire. Defendants, contending that the road had been established by user and that the road was not being put on

the true section line, and that they had title to the enclosed land by adverse possession, put obstructions in the way and blew out a culvért, whereupon this action was brought to restrain them from further interference. A decree in favor of plaintiffs was entered below, and defendants have appealed.

The first contention here is that an abutting landowner cannot maintain a suit for the removal of an obstruction in a public highway. This court, in line with what it has considered to be the better opinion, has settled the rule that such actions can be maintained by one who is in the situation of these plaintiffs. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053; *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843; *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797; *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806.

The real question of law involved is whether a road, established of record along a defined line but which has never been formally opened or laid out upon the ground, will bar the public from afterwards changing the line of travel to the true line. This question has been settled by this court. In the case of *Clark v. Seattle*, 71 Wash. 316, 128 Pac. 670, we held:

“Where the line of travel, in order to avoid hills, ravines and like topographical obstructions in the authorized way, leaves it for the purpose of going around the obstacle and, when passed, again enters the authorized way, that this is as much an opening and public use of the untraveled portions of the road as of that part actually used.”

This being so, it follows that no right in the untraveled part of the road can be gained by adverse possession. A county holds an easement in its highways in trust for the public. *Sumner v. Peebles*, 5 Wash. 471, 32 Pac. 221, 1000; *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549; *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182. An easement, once asserted by the public, will not be lost unless in virtue of some statute, or nonuser for a time, and under such circumstances as will create an estoppel. 37 Cyc.

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195. As illustrative of our argument, it is only necessary to call attention to the fact that, in recognition of this principle, we have a statute vacating roads that have not been opened or traveled for a certain number of years. Rem. & Bal. Code, § 5673 (P. C. 441 § 83). This statute does not recognize any right of adverse possession in the former or present owner of the abutting property, but is based upon the common law of presumption of abandonment. No such presumption attends this case. The road has been used by the people since it was first laid out. It, like hundreds of other roads in unsettled portions of the state, has wound its way around natural obstacles and, no doubt, at times its path has led entirely outside of the right of way. It has been so in every new or sparsely settled country. As population grows and land becomes valuable, an individual may fence his holdings and insist that the travel, which for convenience may have cut across his land without regard to the survey, shall follow the path shown upon the records. The cases sustaining the holding of the trial judge are, collected in the *Clark* case, and in 37 Cyc. 199.

Appellants have brought the record of the establishment of the road to this court and ask us to find, in aid of their contention, that, because of informalities in the proceeding, the road has no legal existence; that the statute of limitations has run in their favor; and that the proceedings were insufficient to warrant a finding that a lawful road was laid out on the section line as the trial judge found it to be.

It is unnecessary for us to make a technical examination of this record. A casual inspection of it, taken in connection with the whole testimony and the testimony of the defendants, convinces us that it was sufficient and that it was the intention of the whole neighborhood to put the road upon the section line as it was established. In fact, that is all there is to this case, both sides insisting that it be put upon the section line. The only question remaining therefore, is one of fact: that is, the location of the section line.

It is the contention of the defendants that there was no quarter corner on the line between sections 17 and 18; that the line ran in a straight line from the intersecting corner on the north to the intersecting corner on the south; whereas, the line, as contended for by the plaintiffs, runs to a quarter corner 105 feet west of a true line drawn from the north boundary of the section to the south boundary, and about 28 or 29 feet west of the same straight line as drawn between the lands of the plaintiff and the defendants. The surveyor who surveyed the road in 1893 says that he did not see a quarter corner. A surveyor who surveyed the line of the road and who was a witness for defendants, says that he assumed that the line between sections 17 and 18 was a straight line north and south with the usual variations. On the other hand, one of the volunteers who made the road says—we will give the testimony in narrative form—I knew where the section corner was for Mr. Weedon had shown us the corner by the school house, and Mr. Johns and Mr. Evans had shown us a quarter corner at the graveyard and there was a stake there that looked just exactly like a government surveyor had made it. Another neighbor, who lived there at the time the land was surveyed, and who helped work the original road, says that the quarter corner was pointed out to him by one of the chainmen about two days after the survey; that it was in the early 70's; there were witness trees; that thereafter he and the defendant Mr. Weedon, whose land adjoined his, measured out an east and west line, and that the quarter corner was their starting point. Another witness, who was there when the government surveyor located the corner, affirms his knowledge of it. He thinks it is in the middle of the road as now established. He says he does not think it has been changed from its original location, although everything is cut away from there now. Another witness testifies to the location of the cemetery by measuring from the quarter corner. Another neighbor who helped locate the cemetery ground testified to the same fact. A witness testified that he located his land some thirteen years

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ago by taking the quarter corner as it is now located for his starting point. The surveyor who surveyed the road originally says that he found the section corner posts and witness trees at both corners of the section; that he ran a random line south on a variation of N. $22^{\circ} 50'$; that he did not have the United States field notes and that he did not find the quarter corner. This is only negative testimony and cannot be held to be controlling as against the positive testimony of plaintiffs' witnesses; for if, in fact, the quarter corner was located one hundred and five feet west of a true north and south line, it is not likely that it would be noticed by him in a densely timbered country. Other questions are raised, but we find no merit in them.

We think the evidence clearly preponderates in favor of the finding of the trial judge, and that his decree establishing the road on the line between the section corners and the quarter section corner as it was located and its location is now fixed upon the ground by testimony of the witnesses, should be held to be the true line of the highway.

Affirmed.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11798. Department One. August 11, 1914.]

MARY S. GIBSON, *Respondent*, v. JAMES W. ROUSE *et al.*,
Appellants.¹

VENDOR AND PURCHASER—CONTRACT—FORFEITURE—DEFAULT IN PAYMENT—WAIVER. Where contracts for the sale of property declared the time of payment of their essence, and provided that the vendors might declare the contracts forfeited and retain payments made, upon failure of the purchaser to make deferred payments promptly, conversations on the part of one of the vendors leading the purchaser to believe that prompt payment of balances due would not be insisted upon, and the execution of mortgages upon the property not falling due until long after maturity of the deferred payments, constitutes a waiver of the vendors' right to a forfeiture without notice and tender of performance.

SAME—FORFEITURE—TENDER OF DEED—NECESSITY. In such case, the vendors, having waived the provision making time of payment the essence of the contracts, cannot thereafter claim a forfeiture and put the vendee in default without first tendering a deed and demanding payment of the purchase price.

SAME—NOTICE OF FORFEITURE—EVIDENCE—SUFFICIENCY. Whether the vendors ever gave notice of an intention to forfeit the contracts after waiver of the provision making time of payment the essence thereof, is not sufficiently shown by their testimony that they wrote letters to the vendee demanding payment and notifying her that, in default thereof, the contracts would be forfeited, the vendee having denied receipt of the letters.

SAME—FORFEITURE—TENDER OF CONVEYANCE—INABILITY TO CONVEY TITLE. Where vendors waived provisions in contracts for the sale of land declaring time the essence thereof, but made no tender of a deed and were not in position to convey a clear title, owing to their execution of mortgages on the land pending maturity of the contracts, they cannot put the vendee in default, while the mortgages remain unpaid, by demanding payment and threatening forfeiture of the contracts.

SAME—RESCISSION BY VENDEE—TENDER—NECESSITY—RECOVERY OF PAYMENTS. Vendors in contracts of sale, who withdrew the contracts from escrow without right, and while they were in no position to have performed the contracts themselves, cannot complain

¹Reported in 142 Pac. 464.

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that the vendee accepted such acts as a rescission on their part and claimed a right to a return of the money paid; and the vendee is not bound to a tender of performance on his part.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 11, 1913, upon findings in favor of the plaintiff, in consolidated actions for rescission, tried to the court. Affirmed.

Zent, Powell & Redfield and Nuzum, Clark & Nuzum, for appellants.

Sampson & Heil, for respondent.

ELLIS, J.—The plaintiff brought separate actions to rescind two real estate contracts, and to recover the money which she had paid thereon. The actions were consolidated and tried together. The following facts were admitted: On May 1, 1910, the plaintiff entered into a contract with the defendants whereby she agreed to purchase from them certain property, in Rouse addition to Spokane, for \$1,000. She paid \$800 down, leaving a balance of \$200 to be paid, \$100 on or before May 6, 1911, and \$100 on or before May 6, 1912. On July 1, 1910, she entered into a similar contract with the defendants for the purchase of property in Roosevelt addition to Spokane. The contract price was \$2,000. She paid \$1,900 down, leaving a balance of \$100 to be paid on or before July 1, 1911. Both contracts provided that the deferred payments should bear interest at eight per cent per annum from date. Each contract declared the time of payment of its essence, and provided, in substance, that if the purchaser should fail to make payments punctually as therein specified, the seller might, at his option, declare the contract null and void, and the purchase money already paid should be forfeited by the purchaser in lieu of rent. Both contracts were placed in escrow in the Old National Bank of Spokane. The plaintiff failed to meet the deferred payments, and, on September 20, 1911, defendants, claiming the contracts void, withdrew them from escrow. All of the property in question was vacant and unimproved.

For convenience, we shall designate the contracts, respectively, the small and the large contract.

After the execution of these contracts, and before they were withdrawn from escrow, the defendants placed three mortgages upon the properties covered by the contracts, two of them before any of the deferred payments became due, and one a short time after the maturity of the deferred payment on the large contract. At the beginning of the trial, the defendants offered to convey the properties to the plaintiff if she would pay the balances due and the assessments and expenditures for improvements which the defendants had made upon the properties. This offer was refused.

Touching other matters, the evidence was in sharp conflict. The plaintiff and her two daughters, who assisted her in business matters, testified that none of them were ever requested to make any additional payments upon any of these properties, and never at any time received any letter or notice of any kind so requesting. The plaintiff and one of these daughters testified that the defendants, in February, 1911, verbally agreed to allow her an indefinite extension of time, even discouraging any effort on her part to complete the payments. The other daughter testified that, about two weeks later, the defendant Rouse, in effect, repeated this promise to her, stating that he was endeavoring to make a sale or exchange of these properties for a residence for the plaintiff. All three testified, in substance, that on several occasions the plaintiff had expressed to the defendant a desire to sell these lots and buy a home, or to exchange these lots for a residence, and that the defendant Rouse promised to do everything in his power to consummate such a sale or trade; that the defendant at all times professed great friendship for the plaintiff, in whom he inspired absolute confidence, and that she relied upon him to attend to her business and make investments for her. In November, 1911, the plaintiff paid the taxes on the property covered by the large contract for the year 1910, and also certain assessments. She and her daughter testified

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that they first learned that the contracts had been removed from escrow when, in 1912, her daughter sought to pay the taxes for the year 1911, and was informed that the defendants had already paid them. The plaintiff testified positively that she never had any notice whatsoever, either verbal or written, of the defendants' intention to forfeit the contracts or to withdraw them from escrow.

The plaintiff's attorney testified that, about May, 1912, he went to the office of the defendants and tendered to them the amounts still due upon the properties, which tender the defendant Rouse refused to accept. He claimed that the plaintiff had given him the money with which to make this tender. His testimony in that regard was very much weakened by the entries upon his own books, which indicated that, at that time, the plaintiff had given him only \$116, which was about the amount necessary to pay the balance due upon the large contract. The plaintiff testified that she was present at this interview, and that the appellant Rouse did not offer to convey the land if she would pay the balances due, but put his hands upon his desk, and said "nothing doing." Her attorney testified positively that, at another time, he asked the defendant Rouse whether he would accept the money due on the contracts, and that Rouse said he would not.

The defendants' evidence was to the effect that they had repeatedly called upon the plaintiff to complete the payments; that they had written her letters, asking for payment, and that on one occasion, in response to a letter from the plaintiff, George Rouse, a son of the defendants, went to her home, and tendered to her deeds for the lots, demanding payment at that time; that she then said she was not ready to receive the deeds, and showed a disinclination to carry out her contract. This, however, was some time in October, 1910, and before any payment had become due upon either contract. The defendant Rouse himself testified that he was always able to deliver the deeds for the property, and that in July, 1911, the plaintiff came to his office and told him that she had no

money, and that she could not do anything with the lots; that he then told her that he had the deeds ready at any time she wanted to take them, and that two or three weeks later, he withdrew the contracts from escrow. Touching the tender, he testified that plaintiff and her attorney came to his office and told him that they had the money to pay down, but that they did not show it. His own testimony, however, indicates that he declined to accept payment on the large contract unless payment was also made upon the small contract. He testified that he mailed notice of cancellation of the contracts to the plaintiff, and later met one of her daughters on the street and told her about it. The court entered a decree rescinding the contracts, and awarding the plaintiff \$3,014.68, and her costs. The defendants appealed.

The appellants contend that the decree should be reversed for two reasons: First, that the contracts were rightfully forfeited by the appellants; second, that, even conceding that there was no legal forfeiture, still the respondent was not entitled to a rescission and a recovery of her payments because she was herself in default and the appellants were not.

I. Was there a legal declaration of forfeiture? The court made no formal findings of fact; but, in the oral announcement of his decision, he plainly stated his views on the evidence. He was clearly of the opinion that Mr. Rouse, in his conversation with the respondent and her daughters in February and at other times, touching the exchange of this property for other property, led the respondent to believe that it would not be necessary for her to pay the balances promptly and that he would not insist upon the payments being made at the times mentioned in the contract.

A careful consideration of the appellants' abstract of record, fortified by frequent references to the statement of facts, convinces us that this view is supported by a clear preponderance of the evidence. The respondent and both of her daughters so testified, and though the appellants and their son testify to the contrary, the respondent's testimony is corrobora-

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rated by circumstances wholly inconsistent with an insistence upon immediate or even early payment. On June 20, 1911, ten days before the final payment on the large contract became due, the appellants executed a mortgage upon the east fifty feet of the property covered by that contract, securing a loan for \$600, payable by its terms one year from that date. On July 31, 1911, thirty days after the same final payment became due, but almost two months before any act of forfeiture, they executed a mortgage on the west fifty feet of the property covered by the large contract, securing a loan of \$350, payable by its terms two years from that date. On February 10, 1911, almost three months before the first of the two deferred payments on the small contract became due, they executed a mortgage upon the property covered by that contract, securing a loan of \$400, payable by its terms one year from that date. It is true, the appellant Rouse testified that it was understood with the mortgagees that he might pay off these mortgages at any time, but he testified to no definite contract to that effect, and the mortgages themselves negative any enforceable agreement of that kind. The trial court would have been justified in finding, and we do find, that the appellants themselves ceased to treat time as of the essence of the contracts, and orally waived their strict contractual right to a forfeiture without notice and tender of performance. Such a waiver may rest in parol. *Whiting v. Dough-ton*, 31 Wash. 327, 71 Pac. 1026.

"The rule is firmly established in this state that, where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for nonpayment of the purchase price or any installment thereof . . . But the rule is equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser . . ." *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096.

The appellants argue that, under the contract, "the forfeiture is to be worked automatically after default." Assum-

ing, without deciding, that so long as time of payment was of the essence of the contract, and so treated, the obligation on the one hand to pay promptly at the time specified was a condition precedent, independent of the obligation on the other hand to convey, so that, on failure of prompt payment, the appellants might have declared a forfeiture without notice or tender of a deed conveying complete title (*Jennings v. Dexter Horton & Co.*, 48 Wash. 301, 86 Pac. 576), still, after the provision that time was of the essence had been waived, it would seem clear that the obligation on the one hand to pay and the obligation on the other to convey became mutual, concurrent and dependent. Neither party could thereafter put the other party in default or claim a forfeiture without first tendering performance on his own part, and this regardless of the forfeiture clause.

"After the respondents acquired their deed from the state, their obligation to convey and the obligation on the part of the purchaser to pay the purchase price became mutual, concurrent and dependent, and neither party could thereafter put the other in default or claim a forfeiture without first tendering performance on his part; and this, whether the contract contained a forfeiture clause or not. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16; 2 Warvelle, Vendors, p. 824. Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price. . . ." *Tacoma Water Supply Co. v. Dummeruth*, 51 Wash. 609, 99 Pac. 741.

This is certainly true as to the large contract upon which only the last payment of \$100 and interest remained to be made. *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N. S.) 956.

As to whether the appellants ever gave any notice of an intention to forfeit, the evidence was, as we have seen, sharply conflicting. The appellants mainly rely upon their testimony to the effect that they wrote to respondent in April and again

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in July of 1911, demanding payment and notifying her that, in default of payment, the contracts would be forfeited. The respondent testified that no such letters were ever received. Though the mailing of a letter is *prima facie* evidence that it was received, this court has distinctly held that it is nothing more, and that it will have but little weight against positive testimony that the letter was not received. *Ault v. Interstate Sav. & Loan Ass'n*, 15 Wash. 627, 47 Pac. 13. The trial court must have believed the respondent's statement that she never received either of these letters. Upon the whole record, we cannot say that the appellants established the fact that they ever gave to the respondent notice of a specific intention to declare a forfeiture. In *Douglas v. Hanbury, supra*, upon a similar state of facts, this court declined to disturb the court's finding that no such notice was established. In any event, as we have seen, having waived the provision that time was of the essence of the contract, it was incumbent upon the appellants to tender deeds in compliance with the contracts. It is clear that, at the time the appellants claim to have given the notice, they made no tender of a deed and were not in a position to convey a clear title. There were mortgages with almost a year to run covering all of the properties involved. There is no claim that a deed was actually tendered after the payments became due, or that there was any tender of a release of the mortgages. While these mortgages remained upon the properties, it was not within the power of the appellants to put the respondent in default merely by demanding payment, accompanied with a threat to forfeit. There was no legal declaration of a forfeiture, nor was the right to withdraw the contracts from escrow established.

II. The appellants urge that, though there had been no forfeiture, the respondent was not entitled to a rescission and to a recovery of her payments because she herself was in default and made no tender of payment. While the evidence of tender of the amount due on both contracts was not convinc-

ing, it seems clear that a tender was offered as to the larger contract and refused. But we consider the question of tender immaterial. The appellants, having withdrawn the contracts from escrow, without right and while they were in no position to have performed the contracts themselves, by a conveyance of the property free from incumbrance, had, in effect, rescinded the contracts on their own part. They cannot complain that the respondent accepted that act as a rescission on their part and claimed the right to a return of the money which she had paid. Having repudiated the contract without right, they cannot complain that the respondent met them on the ground which they themselves had elected to occupy. Having themselves rescinded the contract, the respondent was relieved from an offer of performance on her part. We have held, in a case where a vendor had himself repudiated the contract, that a tender of performance by the vendee was not a condition precedent to an action for specific performance. *Bruggemann v. Converse*, 47 Wash. 581, 92 Pac. 429. *A fortiori*, it would seem that, under like circumstances, a tender of performance by a vendee is not a condition precedent to the maintenance of an action for a return of the purchase money paid. This case is clearly distinguishable from *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952, which is relied upon by the appellants. In that case, though the vendor was not in position to convey, the time for performance had not arrived and he had never rescinded nor in any manner repudiated the contract. Had he sought a forfeiture when he himself could not perform, the decision would have been different. The questions presented are largely questions of fact. We are convinced that the evidence was sufficient to sustain the judgment.

Affirmed.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

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Statement of Case.

[No. 11803. Department Two. August 11, 1914.]

MARION SMITH *et al.*, *Respondents*, v. GRUBER LUMBER
COMPANY, *Defendant*, J. M. KEEN *et al.*,
*Garnishees, Appellants.*¹

TRUSTS—IMPLIED TRUSTS—LIABILITY OF TRUSTEE. Where an award of \$25,000 for land condemned for a right of way was paid to a lumber company as owner of the land, and on appeal by claimants to the award the judgment was reversed in their favor and against the lumber company for the amount of the award, the company thereby became an involuntary trustee for the benefit of claimants to whom the money belonged.

GARNISHMENT—PROPERTY SUBJECT—RIGHTS OF DEBTOR AGAINST GARNISHEE—CORPORATIONS—STOCKHOLDERS—IMPLIED TRUST—LIABILITY. Where an award of \$25,000 for land condemned for a right of way was paid to a lumber company as owner of the land, but on appeal by claimants to the award the judgment was reversed in their favor and against the lumber company for the amount of the award, and the trustees of the company, after paying out \$3,000 of the amount on indebtedness of the company, divided the remaining \$22,000 between stockholders of the company, the claimants can recover the award by garnishment proceedings; since the money was wrongfully paid to the stockholders, being a trust fund to which they had no right, and if regarded as property of the company, was an unlawful reduction of its capital stock, it being the right and duty of the company, whose rights measure those of claimants, to recover the payments made to the stockholders, and account therefor to claimants.

MONEY RECEIVED—LIABILITY—MISTAKE OF FACT. Money belonging to another, though paid and received under a mistaken, though honest, belief as to its ownership, may be recovered in an action for money received.

GARNISHMENT—LIABILITY OF GARNISHEE—EQUITABLE CLAIMS. Claimants, who were adjudged owners of an award in condemnation paid to a corporation, can recover in garnishment against the stockholders to whom the money was wrongfully distributed, and are not held to a suit in equity to recover therefor.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered September 9, 1913, in favor of the

¹Reported in 142 Pac. 493.

plaintiffs in garnishment proceedings, upon an agreed statement of facts. Affirmed.

Hayden, Langhorne & Metzger, for appellants.

B. L. Hubbell, for respondents.

PARKER, J.—The plaintiffs, Marion Smith *et al.*, having recovered a judgment in the superior court for Cowlitz county against the defendant, Gruber Lumber Company, for the sum of \$25,000, seek to enforce payment thereof through garnishment proceedings against J. M. Keen, W. W. Emery and M. J. Gruber, owners of all of the capital stock of that company. The garnishee defendants having filed answers, each denying that he is indebted to the lumber company, and denying that he has any property of the lumber company in his possession or control, the question of their liability as garnishee defendants was submitted to the court for decision upon an agreed statement of facts. Upon this submission of the cause, judgment was rendered in favor of the plaintiffs against J. M. Keen for \$2,200, against W. W. Emery for \$8,250, and against M. J. Gruber for \$11,550, making a total of \$22,000.

The undisputed facts are as follows: The Gruber Lumber Company is a domestic corporation, with a capital stock of \$20,000, all of which has been subscribed and paid for. At all times herein mentioned, appellants have been the owners of all the capital stock of the lumber company, and appellants W. W. Emery and M. J. Gruber have been the trustees thereof. In April, 1910, the Northern Pacific Railway Company commenced an action in the superior court for Cowlitz county, seeking to acquire by condemnation certain land for a right of way, which action resulted in an award of \$25,000 for the land, and the payment of that sum by the railway company into court, in pursuance of such award, in July, 1910. Thereafter, a controversy arose between various claimants to the money so paid into court by the railway company, rested upon their claimed ownership of the land condemned.

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A trial had in the superior court for the determination of the respective rights of these several claimants resulted in judgment awarding the whole \$25,000 to the Gruber Lumber Company, as the owner of the land condemned, and the payment of the money to the lumber company by the clerk of the superior court on January 11, 1911.

At that time, the resources of the Gruber Lumber Company consisted of \$3,000 in cash and other property of the value of \$4,000. This \$3,000, and also \$3,000 of the \$25,000 paid to the lumber company as the award in the condemnation proceeding, was, by its trustees, paid out on the indebtedness of the company, and the \$22,000 remaining of the \$25,000 received as the award in the condemnation proceedings was, by the trustees of the lumber company, divided between the stockholders of that company as follows: to J. M. Keen \$2,200; to W. W. Emery \$8,250, and to M. J. Gruber, \$11,550.

At that time the trustees, and also Keen, the other stockholder, were acting under the honest belief that this \$22,000 belonged to the lumber company. Thereafter, Marion Smith *et al.*, these respondents, who were claimants and parties to the controversy in the superior court as to the ownership of the \$25,000 award paid into court by the railway company, appealed from the judgment of that court awarding the money to the lumber company. Thereafter, that judgment was reversed by this court, resulting in a judgment being rendered in the superior court in favor of these respondents against the Gruber Lumber Company for the sum of \$25,000 on January 2, 1913. The decisions of this court resulting in that judgment are reported in *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057, and *State ex rel. Smith v. Superior Court*, 71 Wash. 354, 128 Pac. 648.

Thereafter, on January 3, 1913, the day following the rendition of the judgment in the superior court, execution was issued thereon at the instance of Marion Smith *et al.*, these respondents, against the Gruber Lumber Company, and placed in the hands of the sheriff of Cowlitz county for serv-

ice. Thereafter the sheriff returned the execution into court unsatisfied, being unable to find any property of the Gruber Lumber Company subject to execution, as shown by his endorsement thereof. Thereafter, these garnishment proceedings followed, resulting in the judgments against appellants which they here seek to have reversed.

Counsel for appellants invoke the general rule that no greater rights as against a garnishee defendant can be acquired by a plaintiff than such as are possessed and enforceable by his debtor against such garnishee defendant, subject to certain exceptions which, it is insisted, are not applicable here; and argue that appellants are not indebted to the Gruber Lumber Company in any sum recoverable by that company from them. Counsels' position is stated in their brief as follows:

"This court having held that the Gruber Lumber Company is not entitled to the money so paid into the registry of the court for the purchase of the right of way, it inevitably follows that the appellants were not indebted to the Gruber Lumber Company in any amount whatsoever and that the Gruber Lumber Company could not possibly maintain an action against them to recover the amounts so paid."

It is true that the \$25,000 paid by the clerk of the superior court to the lumber company did not belong to that company, but it is plain that the lumber company received the \$25,000 and became an involuntary trustee thereof for the benefit of respondents, to whom the money, in fact, belonged, as was later determined. That \$22,000 of this money was wrongfully, at least in a legal sense, paid out by the trustees to themselves and Keen, the only other stockholder of the company, is plain. This was legally a wrong, because the \$25,000 was a trust fund to which the stockholders of the lumber company had no right whatever; and also because, if this be regarded as the lumber company's own money, the payment of it to the stockholders in this manner was an unlawful depletion of the capital stock of the lumber company by the trus-

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tees from its fixed amount of \$20,000 down to practical insolvency, as is evidenced by the statement in this record of the resources of the lumber company, the amount of its indebtedness, and the return of the execution, issued upon respondents' \$25,000 judgment against the lumber company, unsatisfied. Upon either of these theories, it seems to us the lumber company could recover these payments made to appellants, its stockholders, so clearly were they without right to receive such payments. Nor can we understand how appellants could be heard to question the lumber company's right to recover this money upon the theory that it did not belong to the lumber company, as suggested by counsel for appellants. Clearly, it was both the right and the duty of the lumber company to retain, and recover by suit, if necessary, this \$22,000, as against appellants, though the lumber company was accountable therefor to respondents. It is elementary that "whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had or received." *Gaines v. Miller*, 111 U. S. 395; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 55 Am. St. 878, 33 L. R. A. 670; *Fidelity Nat. Bank of Spokane v. Henley*, 24 Wash. 1, 63 Pac. 1119.

Nor does the fact that the money may have been paid and received under the mistaken, though honest, belief that it belonged to the lumber company, prevent recovery from appellants. 30 Cyc. 1316. This was a mistake of fact, and the payment of the money by the lumber company to appellants rested upon no consideration whatever, legal or moral.

Some contention is made by counsel for appellants that, whatever rights respondents may have as against appellants, as stockholders of the Gruber Lumber Company, must be sought in equity. We cannot agree with this contention if counsel means thereby a suit in equity apart from a garnishment proceeding. A garnishment proceeding is, in substance, nothing more than a suit by a plaintiff against the garnishee

defendants, and we are unable to understand why equitable rights and defenses, as distinguished from those strictly legal, may not be invoked in a garnishment proceeding to the same extent as in an ordinary civil action. In *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956, this court made some observations appropriate to this subject, as follows:

"We think that, if Knatvold was in fact the debtor of Lawrence, Box & Co., by reason of some understanding, either expressed, secret or otherwise, that he should be their trustee, agent, depositary or holder of the property, or any part of it, for their benefit, in order to keep their creditors from reaching it, then the plaintiff would be entitled to hold him as garnishee for the amount of property so held or received by him; and that, too, without regard to whether, as between themselves, Lawrence, Box & Co. could enforce a claim against Knatvold for it. To hold that a creditor cannot compel a garnishee to account for property received by him in virtue of a fraudulent and collusive arrangement with the principal debtor, would be to render the process valueless in many cases. As against the garnishing creditor, the garnishee holding the property of the principal debtor fraudulently is a wrongdoer, and his possession is not a rightful possession. *Cowles v. Coe*, 21 Conn. 220; *Healey v. Butler*, 66 Wis. 9 (27 N. W. 822); *Maher v. Brown*, 2 La. 492; Drake, Attachments (7th ed.), § 523.

"This rule encroaches on no constitutional or legal right of the garnishee. He is required to be served, and has the time afforded defendants in ordinary actions for answering, with the same right to a trial by jury upon issues settled under the direction of the court, and is surrounded by all the safeguards that the law would afford him in any form of action, including the right of appeal."

While it is here conceded that the \$22,000 was paid to, and received by, appellants without fraudulent intent on their part, these remarks are nevertheless applicable in principle to the problem here presented. Wrongs growing out of honest mistake can be redressed in a proceeding of this nature as well as wrongs growing out of fraud. Another error relating to the form of the judgment is suggested by counsel

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for appellants, but it is presented to us without argument on their part. We think it is without merit and does not require discussion.

The judgment is affirmed.

CROW, C. J., FULLERTON, MORRIS, and MOUNT, JJ., concur.

[No. 11819. Department One. August 11, 1914.]

CLARA HISCOCK, *Appellant*, v. A. A. PHINNEY, *Respondent*.¹

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—AUTOMOBILES—LAW OF ROAD—INSTRUCTIONS. In an action for the death of a minor through a collision with plaintiff's automobile while riding a bicycle, instructions that the defendant was not necessarily confined to the use of the right-hand side of the street, and that neither the defendant nor deceased had a superior right to the use of the street but that their rights were equal at the place of the accident, are prejudicial, in view of an ordinance requiring vehicles to keep as near the right-hand curb as possible, and the jury should have been instructed that the defendant would be guilty of negligence if they found he was not driving as near the right-hand curb as possible; since, under the ordinance, the boy had a superior right to the use of the right-hand side of the street, and had a right to assume that he would encounter no object traveling in his direction.

SAME—LAW OF ROAD—ORDINANCES—VALIDITY. An ordinance requiring vehicles to keep as near the right-hand curb as possible is not in conflict with Rem. & Bal. Code, § 5558, requiring travelers on the highway to turn to the right on meeting; and the ordinance establishes the law of the road within the boundaries of the city.

SAME—VIOLATING LAW OF ROAD—NEGLIGENCE—PRESUMPTIONS. There is a presumption that defendant was guilty of negligence in driving his automobile on the left-hand side of the street at the time of the accident, in violation of a city ordinance.

TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY. An omission of the court to adapt the instructions to a particular view of the case is not error, in the absence of a request therefor, Const., art. 4, § 16, providing that judges "shall declare the law," meaning that they shall declare the law applicable to the case in a general way.

DEATH—ACTION FOR WRONGFUL DEATH—PROXIMATE CAUSE—QUESTION FOR JURY. In an action for the death of a minor struck by an

¹Reported in 142 Pac. 461.

automobile while turning a corner on a bicycle, the proximate cause of the accident is for the jury, and defendant's negligence is not established by the physical facts, as a matter of law, from the fact that witnesses' testimony tended to show that certain skid marks in the street and the finding of a box and its contents which were carried on the bicycle showed that the automobile was traveling on the wrong side of the street at the time of the accident, it being a disputed question as to whether the skid marks were made by the defendant's automobile, and there being no admitted physical facts which could control or overthrow the verdict of the jury.

EVIDENCE—OPINION EVIDENCE—RATE OF SPEED—COMPETENCY. A witness may give his opinion as to the speed at which an automobile was traveling, although he had never owned or operated one or had made tests of speed thereby, the weight of the evidence being for the jury.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 2, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death. Reversed.

C. J. Smith (Heber McHugh, of counsel), for appellant.

Brigtmann, Halverstadt & Tennant, for respondent.

GOSE, J.—This is an action to recover damages for the death of a minor son of the plaintiff. The plaintiff alleges that she was dependent upon the son for her support, and that he met his death in consequence of the negligence of the defendant, A. A. Phinney. Plaintiff has appealed from an adverse verdict and judgment.

The casualty happened at or near the southwest corner of 39th avenue and East John street, in the city of Seattle. Thirty-ninth avenue runs northerly and southerly, and East John street runs easterly and westerly and terminates at the avenue, both streets being twenty-four feet in width. The avenue is winding. The boy was engaged in carrying and delivering groceries and meat by means of a bicycle. The respondent was driving a Lozier car, five feet in width, weighing 4,400 pounds, north along the avenue. The boy was riding east on John street. Both were traveling down hill. The

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boy either had turned, or was in the act of turning, south into the avenue. There is a high embankment covered with shrubbery at the southwest corner of the avenue and street where the accident happened. The respondent and other witnesses testified that one traveling north on the avenue cannot see into East John street because of the high embankment and shrubbery. The respondent testified that he was driving about the center of the street, at a speed of seven or eight miles an hour; that, when he first saw the boy, he was six or seven feet distant, "coming from behind the bank," about three feet up John street and "six or seven feet off the southwest curb;" that he, respondent, applied his brakes and stopped his car within six or seven feet; that the boy was riding at a speed of from fifteen to eighteen miles an hour; and that the boy struck the car, bending the brass knob on the west rear door and buckling the rear fender over the left wheel.

A witness for the appellant testified that he arrived at the scene of the accident about forty minutes after it occurred; that he observed skid marks which commenced at the intersection of the streets and extended northerly a distance of about ninety feet, and that the west skid mark was from four to six feet from the west curb. This witness said that the east skid mark was lighter and extended for a less distance than the west mark; that he examined the defendant's machine shortly after the accident, and that the left rear wheel had a smooth tire and the right wheel had a corrugated tire. He further said that, if the respondent's car had new tires and skidded ninety feet, it should have left a mark on the tires. Another witness said the nearest skid mark was three or four feet from the west curb. The boy's father testified that the skid marks were about five feet from the west curb, and that they commenced about ten feet south of the corner. Another witness said that the skid marks commenced about ten or fifteen feet south of the corner; that they were three or four feet from the curb, and

continued about seventy-five feet, curving to the east or the right.

The respondent testified that he had new "Firestone non-skid" tires upon both rear wheels, and that the car did not skid. A witness for the respondent testified that he was engaged in the business of selling Firestone tires; that he examined the respondent's tires the morning after the accident; that they were new "Firestone non-skid tires;" that he saw no evidence that either tire had skidded; that "it would be pretty hard to skid;" and that if he had skidded ninety feet, the tire would be worn practically to the "fabric." Another witness testified in behalf of the respondent that he was an automobile man in the respondent's employ; that he put on "Firestone non-skid tires," two or three days before the accident; that there was no mark on the tires after the accident, and that it would not be possible for the car with such tires to skid ninety feet without leaving distinct marks or scars upon the wheels.

The respondent pleaded affirmatively, and the reply admitted, that an ordinance of the city of Seattle provides:

"Sec. 1. A vehicle, except when passing a vehicle ahead, shall keep as near the right hand curb as possible."

"Sec. 6. A vehicle turning into another street at the right hand shall turn the corner as near the right hand curb as practicable." Seattle Ordinance, No. 24,597.

The court instructed the jury:

"(10) The other ground of negligence charged in the complaint is that the defendant did run and drive his automobile to the left of the middle of the highway. It is for you to determine from all the evidence in the case whether or not the defendant did run his automobile to the left of the middle of the highway, and if so whether or not it was negligence for him to do so, under all the surrounding circumstances in the case, taking into consideration the locality and all surrounding circumstances.

"(11) I instruct you that, even though you should find from the evidence that the defendant, at the time and place

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of the accident in question, was not driving on the right-hand side of 89th avenue north that fact would not, in itself, constitute negligence. A person is not always required to drive upon the right-hand side of the street or highway. The law in this state does not require the driver of an automobile to drive upon the right-hand side of the street at all times, but requires the driver or operator of an automobile to turn to the right in meeting vehicles, teams, or persons moving or headed in an opposite direction. A person may rightfully use what is to him the left-hand side of the road, if there is no driver at that time on that side of the road, and if the circumstances are of such a character as not to make his conduct a source of danger reasonably to be apprehended."

The court also instructed:

"I instruct you that neither the deceased Fred Hiscock nor the automobile of the defendant at the time and place of the accident complained of in this case had a superior right to the use of the streets, but that their rights were equal."

The appellant assigns error upon the giving of these instructions. The instructions seem to have been based upon the statute rather than the city ordinance, and do not correctly state the law in the light of the ordinance. Under the first section of the ordinance, it was the duty of the respondent to keep "as near the right-hand curb as possible." This he did not do. Nor is it the law, in the light of the ordinance, that neither "had a superior right to the use of the streets, but that their rights were equal" at the "place" of the accident. Under the ordinance, the boy had a superior right to the use of the right-hand side of the street. *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050; *Reynolds v. Pacific Car Co.*, 75 Wash. 1, 134 Pac. 512. In *Ballard v. Collins*, in speaking of an ordinance of the city of Seattle, we said:

"While the respondent's chauffeur was required to exercise reasonable care, he was not required to anticipate that a car was approaching on his side of the street. He had a right to presume that the law of the road would be observed."

So in the case at bar, the boy had a right to assume that he would not meet a traveler upon his side of the street; and so long as he was upon his side of the street, he was traveling with a faith justified by law that he would encounter no object traveling in his direction. A traveler who is observing the ordinance has a superior right to the use of the street over one who is traveling in disregard of the ordinance.

A reference to the record shows that these instructions were prejudicial. After the jury had been instructed and had retired to deliberate, they returned to the court room for further instruction. Whereupon the court said: "I understand you want some further instructions?" to which one of the jurors replied, "Yes, sir. The jury seems to be in doubt as to part of the instructions as to whether the defendant had the right to the center of the road or street." Whereupon the court re-read instruction No. 11, and then said to the jury, "Does that cover the point?" to which the juror replied, "I think so, sir."

The question at issue is, what was the proximate cause of the death of the boy? The jury should have been instructed that, if they found that the respondent was not driving "as near the right-hand curb as possible," in view of the width and course of the avenue and other surrounding conditions at the time of the accident, he was guilty of negligence.

The respondent relies upon *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876. It does not sustain his position. The instructions were evidently drawn in harmony with that case. There we were speaking of the statute and the law of the road arising from usage and custom. There was no ordinance involved.

Nor does the ordinance conflict with the statute, Rem. & Bal. Code, § 5558 *et seq.* (P. C. 33 § 13). It covers conditions which the statute does not reach. There being no conflict, the ordinance establishes the law of the road within

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the boundaries of the city. *In re Ferguson*, 80 Wash. 102, 141 Pac. 322.

The appellant requested the court to instruct the jury that, if they believed from the evidence that the defendant was driving his automobile on the left-hand side of the street at the time the accident occurred, his negligence was presumed. This instruction should have been given.

The appellant also complains because of the failure of the court to instruct upon certain phases of the evidence in respect to negligent acts of the respondent, which are not charged in the complaint, and upon which she made no request for instructions. Counsel insists that this was error, relying upon § 16, art. 4, of the constitution, which provides that judges "shall declare the law." This we have construed to mean that the court shall declare the law applicable to the case in a general way. If a party desires to have the instructions adapted to a particular view of the case or to meet a situation which he conceives ought to be covered, it is his duty to specially request them, and in the absence of such a request, a mere omission upon the part of the court to instruct is not error. *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090.

The appellant further contends that the verdict of the jury cannot be harmonized with the physical facts. Other facts relied upon in addition to the skid marks are that pieces of a wooden box and its contents, which the boy was carrying upon his bicycle, were found along the west curb of the avenue some ten or fifteen feet south of the point where the avenue and the street intersect. From what has been said, it will appear that it was a disputed question of fact whether the skid marks were made by the respondent's automobile. There are no admitted physical facts which could control or overthrow the verdict of a jury. The point of actual contact, as well as the question whether the respondent's car made the skid marks to which the witnesses

testify, was a question for the jury. *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941.

A witness for the respondent, Arthur Bond, testified that the respondent's car passed him in the block where the collision occurred; that the car appeared to be in the center of the street; that he observed the speed of the machine; that he has seen many automobiles in motion, and that in his opinion the car was not going more than nine miles an hour. On cross-examination, he testified that he had never owned or operated an automobile, and that he had never made tests of speed or distance traveled by an automobile in a given space of time. It is contended that the court erred in refusing to strike the testimony of the witness as to the rate of speed, upon the appellant's motion. It is argued that the testimony was inadmissible "unless the witness was thoroughly qualified as an expert and his observation was such as to justify him in forming an opinion." No authorities are cited in support of the contention. We think the testimony was competent. Its weight, of course, was for the jury.

Other alleged errors, such as that the court commented upon the facts, do not merit consideration.

The judgment is reversed, with directions to grant a new trial.

CROW, C. J., ELLIS, and MAIN, JJ., concur.

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[No. 11845. Department One. August 11, 1914.]

In re WEST BERTONA STREET.SEATTLE SEMINARY, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW. The action of the board of eminent domain commissioners in assessing the benefits to property from a public improvement will not be reviewed in the absence of fraud or arbitrary action, or unless they proceeded upon a fundamentally wrong basis.

SAME—BENEFITS—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show arbitrary action on the part of eminent domain commissioners in assessing plaintiffs' land for the cost of a public improvement, where it appears that part of an unplatted tract used for school purposes was condemned for a street in order to give other property owners access to the principal thoroughfare, the appellants having access through their property, and that the property was assessed practically 40 per cent of the cost of the improvement, though not benefited for school purposes; and although benefited to some extent as real estate, before it could be sold for residence or business property, it would have to be platted and additional streets opened.

Appeal from a judgment of the superior court for King county, Humphries, J., entered February 26, 1913, confirming an assessment roll, on appeal from eminent domain commissioners. Reversed.

Milo A. Root, for appellant.

James E. Bradford and *W. D. Covington*, for respondent.

GOSE, J.—This is an appeal by the Seattle Seminary, a corporation, from a judgment confirming an assessment roll, returned by the board of eminent domain commissioners. The purpose of the assessment is to pay the costs and expenses incurred by the city in condemning, appropriating, and damaging private property, for laying off, extending, and establishing West Bertona street from Third avenue west to Fifth

¹Reported in 142 Pac. 483.

avenue west, in the city of Seattle. The larger part of the property condemned was taken from the north end of the appellant's property. The appellant's property consists of an unplatted five-acre tract in Victory addition and a tier of coterminous lots lying between it and Third avenue west. It touches Third avenue for a distance of six hundred feet. The assessment district lies on the east face of Queen Anne hill, and we infer from the testimony that the property in the assessment district slopes from the northwest to the southeast. The purpose of extending West Bertona street was to make the property lying to the west and northwest of the projected street accessible to Third avenue west and Nickerson street. Third avenue west is the principal thoroughfare to that part of the city lying north of the canal. Nickerson street, which extends in a northwesterly and southeasterly direction, is the main artery of travel between that part of Queen Anne hill and the main part of the city.

It is contended that the benefits have not been equally distributed, and that the appellant's property has been assessed too high in comparison with other property which has received an equal or greater benefit. We have held that the courts will not change the district established by the commissioners or modify the assessment, except where the commissioners have acted "arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis." *Spokane v. Miles*, 72 Wash. 571, 181 Pac. 206; *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211; *In re Ninth Avenue West*, 76 Wash. 401, 136 Pac. 488; *In re West Wheeler Street, Seattle*, 77 Wash. 3, 137 Pac. 303. The basis of this rule is that the same verity is accorded to the acts of the board of eminent domain commissioners as to other official action. *Spokane v. Fonnell, supra*.

The appellant's property is all in one tract and devoted to school purposes. Before the condemnation, it had access through its own property to the territory to the west and the northwest. The property to the west and northwest had no

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feasible access to Third avenue west and Nickerson street, and the property immediately to the east of the appellant's property had no feasible access to the territory to the west and the northwest prior to this condemnation. The appellant's property was assessed at approximately forty per cent of the cost of the improvement, distributed as follows: To the unplatted portion, containing about five acres, \$2,159.96; lot 2, which lies at the intersection of West Bertona street and Third avenue, \$223.98; the corner lot directly across Third avenue to the east is assessed at \$42.66; lot 3 of the appellant's property is assessed at \$96; lot 4, at \$48; lot 5, at \$23.99. A lot immediately to the east of lot 5 is assessed at \$10.66. Lot 1 across Third avenue is business property, and no reason appears from the record for assessing the appellant's corner lot at five times the amount of the assessment placed upon this lot. The corner lot lying immediately west of the appellant's property is assessed at \$160; the lot south of it at \$80; the corner lot on the first block to the west is assessed at \$64. The same disparity exists largely in the assessment of the property lying north and northwest of the appellant's property.

It is apparent from the record that West Bertona street was extended to connect with Emerson street for the purpose of affording the property owners to the west and northwest a means of access to Third avenue and Nickerson street, and to afford people to the east of Third avenue feasible access to the west and northwest. As we have suggested, the appellant had such access through its own property. The record shows no reason for assessing appellant's unplatted property in so large a sum. For school purposes, the property has not been benefited. Treated as real estate, it has been benefited, but it is obvious that the unplatted property has not been benefited to the extent of the assessment. It cannot be sold as residence or business property without platting and without providing for additional streets. We think the dis-

parity in the assessment is so great as to conclusively show arbitrary action upon the part of the commissioners.

The judgment will be reversed, with directions to the court to have the property reassessed.

Crow, C. J., Ellis, and Chadwick, JJ., concur.

[No. 11858. Department One. August 11, 1914.]

ALONZO RIGGS *et al.*, *Appellants*, v. B. H. GERMAN *et al.*,
Respondents.¹

SHERIFFS AND CONSTABLES—PROTECTION OF PRISONERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that a sheriff was negligent in failing to prevent an assault on a prisoner by the inmates of a jail, where it appears that, soon after his commitment, he was brought before the Kangaroo court and fined by the judge thereof, which fine he refused to pay, whereupon he was beaten with a razor strop; it appearing that the sheriff, while having knowledge of the existence of the Kangaroo court and its rules, had no knowledge or good reason to believe that the prisoners contemplated an assault upon the plaintiff; and it was shown that Kangaroo courts were maintained in all jails and were considered an aid to the sheriff in keeping the prisoners clean and orderly; a sheriff being bound only to the exercise of reasonable and ordinary care in protecting a prisoner, in the absence of circumstances showing that he had reason to anticipate danger.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 20, 1913, dismissing an action in tort, upon granting a nonsuit. Affirmed.

A. L. Slemmons, for appellants.

E. K. Brown and E. E. Wager, for respondents.

CHADWICK, J.—Plaintiff was committed to the county jail at Ellensburg, at about a quarter to twelve o'clock. He paid his fine and was released about four o'clock. The record shows that it is customary to maintain in the jails of the country, a "Kangaroo Court," the object of which is

¹Reported in 142 Pac. 479.

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to promote health and cleanliness. The rules of the Kangaroo court in the jail at Ellensburg are as follows:

"Rules of the Kangaroo Court of Kittitas County Jail.

"(1) The court must have a sheriff, judge and prosecuting attorney. (2) Every person entering this jail is guilty of a misdemeanor and upon conviction is subject to a fine, of not more than two dollars, (\$2.00). (3) Every cell must be swept and mopped at least once a day. (4) All dishes must be washed after each meal. (5) Each and every one excepting the 'Mucker' must stay in cells during dishing up of meals. (6) The judge can call court whenever he sees fit. (7) The use of the toilet is prohibited during meals. (8) The throwing of scraps on the floor is strictly against the rules. (9) No profane language is allowed during meals. (10) Each person must take a bath at least once a week. (11) No loud talking after nine o'clock. (12) Each and every one must keep their cells clean and free from vermin. (13) Re. Rule No. 2. All fines to be paid into treasure of Kangaroo Court. (14) The jailor will be treasurer of said court. (15) The monies paid into said treasure can be checked against by judge for tobacco etc., to be distributed among all prisoners. The above rules to be strictly enforced by the judge. . . . (16) Each and every inmate must take a bath immediately after entering said jail. (17) No spitting in sink at any time."

After plaintiff had been committed, and at the noon hour, he was called before the judge of the "Kangaroo Court" and was fined \$2, and was requested to sign an order on the jailer for that amount of money. This he refused to do, whereupon he was taken hold of by the sheriff of the "Kangaroo Court" and by others and thrown upon the floor and was beaten over the back and loins with a razor strop. There is testimony sufficient to warrant the holding that he was injured and is still suffering from the hurts and bruises then inflicted. After the payment of his fine and discharge, he brought this action against the defendant sheriff and his bondsmen. In addition to the facts stated, it developed upon the trial that there had been no other instance of any beating or enforced

discipline within the range of the testimony taken at the trial.

There are but two instances that can in any way be relied on as ground for the maintenance of this action against the sheriff. The one is that the jailer was told, within about an hour after the session of the Kangaroo court, that plaintiff was hurt and demanded to be taken out, which demand was repeated again before his final discharge; and the further circumstance that one of the witnesses so testified as to warrant a holding that the sheriff admitted to him that he was aware of the fact that the Kangaroo court was in the habit of inflicting corporal punishment.

The first circumstance, standing alone, has no evidential weight. It would not follow, as a matter of law, that notice of such violence, if it had been inflicted, would bind the sheriff or charge the sheriff with notice that plaintiff or prisoners previously incarcerated might be subject to the assaults of fellow prisoners. So far as the record goes, the only notice of the conduct of the members of the Kangaroo court that had come to the sheriff would be such notice as is imported or implied by reading the rules of the court. The material part of the testimony of the witness who testified to a knowledge on the part of the sheriff is as follows:

"Mr. German explained the case to me saying, . . . that it [the court] was an institution that was in every jail in the country, particularly in the larger cities; that it was something that they considered a necessity because it was a way they had for keeping the prisoners clean and orderly, as they had rules which made the prisoners much better for having them. And he specified several things that the court did, and for instance, if a man didn't make his bed he got a certain number of straps and if he didn't wash himself he would get a certain number of straps. . . . Q. You say he spoke of the rules of this Kangaroo court, and enumerated what they were? A. Yes, some of them. Q. And that for an infraction of these rules the court would administer punishment? A. Yes, a certain number of straps for certain offenses."

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And on cross-examination:

"When he told you about Kangaroo court he was talking about the Kangaroo court system all over the country? A. Yes, sir. Q. And he didn't attempt to give you the rulings of his court at all? A. Well, I think so,—I asked him about that. Q. You have no particular occasion for remembering? A. No, not at all. Q. You would not undertake to say now that he said it was the custom of the Kangaroo court in his jail to flog prisoners, or administer straps to them? A. Well— Q. You would not be certain about that? A. I took it for that—he said that these courts existed in all jails and he spoke of the rules—I would not say that he said the rule was so in his jail—but I took it for that. Q. You would not say that Mr. German told you that he had ever authorized or had ever known of any flogging or strapping of prisoners in his jail? A. Well, no, if you put it that way; he said that was what was being done and that was what was done. Q. He was speaking of Kangaroo courts in general? A. Well, yes, in general, but I asked him what had been done to Riggs. Q. And he expressed sorrow that anything had ever been done to Riggs? A. He did. Q. And he didn't say that he or his deputies had ever authorized anything to be done to Riggs? A. No, no, not in so many words."

To give this testimony the effect which plaintiff insists that it should be given, would be to charge the defendant with a willful purpose to violate his official oath. The defendant is protected by a presumption that he has in all things performed his official duties, not the least of which is the exercise of reasonable and ordinary care to protect a prisoner while in his custody. *McPhee v. United States Fidelity & Guaranty Co.*, 52 Wash. 154, 100 Pac. 174, 132 Am. St. 958, 21 L. R. A. (N. S.) 535; 25 Am. & Eng. Ency. Law (2d ed.), 671. Or, as has been held, a sheriff cannot be charged with neglect in failing to prevent what he could not reasonably anticipate. *Gunther v. Johnson*, 36 App. Div. 437, 55 N. Y. Supp. 869. We think the testimony is wholly insufficient to show that the defendant had knowledge or good reason to believe that the prisoners contemplated an assault upon the plaintiff and that, having such knowledge, he took

no steps to prevent it. He would not therefore be liable under the rule announced in the case of *Nixon v. Cupp*, 5 Okl. 545, 49 Pac. 927, a Kangaroo court case, where the sheriff was held liable, there being testimony adduced to the jury to show that the sheriff knew that it was,

“ . . . the custom of the prisoners confined in the jail under his charge to assault and beat prisoners brought to such jail, after pretended or mock trials, and that he failed to use such means as were at his command to prevent such acts.”

A sheriff should not be required, in the exercise of ordinary care, to maintain himself or a deputy in the presence and company of his prisoners unless the circumstances as developed by the testimony are such that it can be said that the sheriff had reasonable ground to apprehend the danger. We take it from the record that “Kangaroo courts” have come to be established institutions, and are encouraged by sheriffs and jailers. Their rules, if the rules we have quoted are consistent with the rules of Kangaroo courts generally, indicate that their work is in aid of the work of a sheriff, whose duty it is to maintain a fit and suitable place to confine his prisoners and to protect the ones inclined to cleanliness and decency from those who are not. The record in this case is short and we have read the whole of it, and we feel satisfied that no jury would return a verdict against the defendant.

The judgment of the lower court is affirmed.

Crow, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

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Opinion Per MAIN, J.

[No. 11864. Department One. August 11, 1914.]

UNION TRUST & SAVINGS BANK, *Trustee etc., Appellant*, v.
BENJAMIN E. AMERY, *Respondent*.¹

APPEAL—RECORD—ABSTRACT—SUFFICIENCY—DISMISSAL. An appeal will be dismissed for failure of the abstract of the record to comply with 3 Rem. & Bal. Code, § 1730-1 *et seq.*, and rule six of the supreme court, where it contained no part of the record other than the statement of facts, was not indexed, contained no reference by page to the statement of facts, and did not follow the form prescribed; and the fact that the appellant filed with its reply brief an abstract conforming to the statute and rule would not cure defects in the former abstract.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered September 10, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Appeal dismissed.

F. M. Goodwin, J. B. Campbell, and J. D. Campbell, for appellant.

H. M. Stephens, for respondent.

MAIN, J.—The plaintiff brought this action as trustee in bankruptcy for the Syphers Machinery Company, a corporation, for the purpose of recovering from the defendant \$5,500, alleged to be due upon the purchase price of corporate stock in the insolvent corporation. After issues were joined, the cause was tried to the court and a jury, and resulted in a verdict for the defendant. Thereupon judgment was entered upon the verdict. The plaintiff appeals.

The respondent moves to dismiss the appeal because the appellant's abstract does not conform to the statutory requirements or to the rules of this court. The statute (Laws of 1913, ch. 116, p. 349; 3 Rem. & Bal. Code, § 1730-1 *et seq.*), requires that the appellant, at or before the time when he is required by rule or statute to serve his opening brief,

¹Reported in 142 Pac. 492.

shall serve upon the opposite party an abstract of so much of "the record and statement of facts" as he may deem necessary to a proper hearing of the case upon appeal. Rule 6 of this court requires that the abstract shall be in the same form as the transcript, shall be indexed, shall contain appropriate references by pages to the transcript or statement of facts, and shall be substantially in the form there prescribed.

The abstract served by the appellant with its opening brief contained only so much of the *evidence* as the appellant deemed necessary for the proper hearing of the assignments of error. No part of the record, other than the statement of facts, was embodied in the abstract. It was not indexed. It did not contain references by pages to the statement of facts, and did not follow the form prescribed by the rule. That the abstract did not conform to the statute and the rules of court was recognized by the appellant. When it filed its reply brief, it also filed an abstract of the record which conformed to the statute and the rule. But this would not cure the defects in the former abstract. The first abstract was little if any better than no abstract at all. The case falls squarely within *Ollar-Robinson Co. v. O'Neill*, 80 Wash. 1, 141 Pac. 194, and the recent case of *Caldwell v. Klyce*, 80 Wash. 469, 141 Pac. 1042. An order will be entered dismissing the appeal.

Since the failure to prepare an abstract as required by statute and rule was due to inadvertence rather than design, we may say that we have looked into the record and find nothing therein that would justify a reversal.

Appeal dismissed.

Crow, C. J., Gose, Ellis, and Chadwick, JJ., concur.

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Opinion Per MAIN, J.

[No. 11877. Department One. August 11, 1914.]

JOE KEPL *et al.*, *Appellants*, v. FIDELITY & DEPOSIT
COMPANY OF MARYLAND, *Respondent*.¹

LIMITATION OF ACTIONS—STATUTORY BOND. An action on a bond given to the state by a contractor, as required by Rem. & Bal. Code, § 1159, when work is contracted to be done for the state, county, municipality or other public body, is barred by the statute of limitations, where more than three years elapsed between the accrual of the action and the filing of the complaint.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 9, 1913, dismissing an action on contract, after a trial on the merits to the court. Affirmed.

Frederick W. Dewart, for appellants.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondent.

MAIN, J.—The purpose of this action was to recover on a surety bond for supplies furnished a subcontractor.

During the month of June, 1910, Ilse & Elliott, a copartnership, entered into a contract with the state of Washington for the construction of a road, in Spokane county. They gave a bond to the state, with the defendant, the Fidelity & Deposit Company of Maryland, as surety. This bond was conditioned that the copartnership would fully perform the contract and pay all laborers, mechanics, subcontractors, and materialmen, and all other persons who should supply such laborers, mechanics, or subcontractors with materials, supplies or provisions for carrying on such work, and all just debts incurred in the performance of the work. The plaintiff and others, whose claims had been assigned, furnished provisions and supplies to one Starling, a subcontractor, for which payment had not been made. In March, 1912, the

¹Reported in 142 Pac. 489.

contract was discontinued and a settlement had between the state and the copartnership. Within thirty days thereafter, each of the creditors whose claim is involved in this action gave due notice to the state, as required by the statute, of the claim under the bond. Subsequently the present action was instituted against the surety company, only. More than three years had elapsed after the cause of action accrued and the complaint was filed. The cause was tried by the court, and a judgment of dismissal entered on the ground that the three-year statute of limitations governed, and more than three years having elapsed between the time when the cause of action accrued and the suit was instituted, it could not be maintained.

The bond in question was the statutory bond required by Rem. & Bal. Code, § 1159 (P. C. 309 § 93), when work is contracted to be done for the state, county, municipality, or other public body. The question here presented was decided adversely to the contention of the appellants in *Johnson Service Co. v. Aetna Indemnity Co.*, 46 Wash. 434, 90 Pac. 590. The appellants, however, claim that the decision of this question was not necessary to a determination of that case, and would, therefore, not be controlling. In this we cannot concur. The record in that case shows that one of the grounds upon which the demurrer to the complaint was based was the statute of limitations. The question was in the case. What was said thereon in the opinion was not, therefore, dictum. That case would necessarily be overruled by a reversal of the present case.

The judgment will be affirmed.

CROW, C. J., GOSE, ELLIS, and CHADWICK, JJ., concur.

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Syllabus.

[No. 11881. Department One. August 11, 1914.]

ALBERT FORSYTH, *Appellant*, v. DAVID DOW *et al.*,*Respondents.*¹

JUDGMENT—NOTWITHSTANDING VERDICT—MOTION FOR—POWER OF COURT. After the entry of a judgment upon the verdict, no motion other than a motion for a new trial or to vacate it can be made or entertained by the court, and it is error to grant a motion for judgment *non obstante veredicto*.

SAME. A motion for judgment notwithstanding the verdict invokes no element of discretion, but will only be granted where the verdict is so contrary to law, or taking the evidence as undisputed, a judgment cannot be entered.

JUDGMENT—ENTRY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 431, providing that the clerk shall immediately enter judgment on the verdict when returned, violates no constitutional provision, as the verdict is received by the court, the entry of the judgment being a ministerial act; hence the judgment should be entered at once, unless the judge reserves judgment or directs that it be not entered.

JUDGMENT—ENTRY—FORM. A judgment is not invalid in that it lacks formality and is not signed by the judge, or where the record does not show that the journal was signed by the judge for the day proceedings were had; since it is not essential that judgments rendered and entered on verdicts be drawn with the formality of other judgments.

JUDGMENT—VACATION—SECOND JUDGMENT. After entry of final judgment on the verdict, the court is without power to enter another until the first is regularly cancelled or set aside; and the first judgment is not vacated by a second judgment making no mention of the first.

FRAUD—ACTION FOR DECEIT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to establish a showing of deceit in carrying out an agreement to furnish motors to plaintiff at the price paid therefor by defendants, which was claimed to be the list price, but which was a price higher than that paid by defendants, although it was shown that plaintiff admitted that he knew, before the trade, that they could be purchased for less than he paid, that the price paid by defendants was stated in a conditional bill of sale which was of record, and that plaintiff's attorney knew the price paid by defendants, where plaintiff testified that, although he heard the motors

¹Reported in 142 Pac. 490.

could be purchased for less money, the defendants made him believe they were paying the full price therefor, and plaintiff was corroborated by two witnesses, and it further appeared that the record of the conditional bill of sale furnished no notice to plaintiff, and the evidence was in conflict as to whether the attorney had communicated his knowledge of the purchase price to plaintiff.

ATTORNEY AND CLIENT—NOTICE TO ATTORNEY—SCOPE OF EMPLOYMENT. An attorney employed to pass upon the title to personal property is not a general agent of the client, and notice to him of the price paid by the vendor will not be binding upon the client; since it is not within the scope of his employment and he is therefore not bound to communicate any collateral fact touching a contract between his client and the vendor, although he had knowledge of facts that would estop his client if they had been known to him.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 13, 1913, in favor of the defendants, notwithstanding the verdict of a jury in favor of the plaintiff, in an action for deceit. Reversed.

Wingate & Dolby, for appellant.

Jay C. Allen, for respondents.

CHADWICK, J.—This case was tried before a jury, and a verdict was returned in favor of the plaintiff. A motion for judgment of nonsuit and for a directed verdict were overruled. The clerk, after noting the closing of the trial, made the following entry in the journal of the court:

"Plaintiff rests. Defendants move for judgment. Motion denied and exception allowed. The Court instructs the jury, respective counsel argue to the jury, and at 1:50 p. m. the jury in charge of sworn officers retires to deliberate upon its verdict, and at 3:25 p. m. the jury having agreed brings in the following verdict, Viz: We the jury in the above entitled cause do find for the Plaintiff in the sum of Thirteen Hundred Ninety-nine and 23-100 Dollars. (\$1399.23) W. E. Lovejoy, Foreman. The jury is polled and twelve jurors answer that it is their verdict and the verdict of the jury. The verdict is received and filed and judgment is hereby entered in accordance with the verdict in

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favor of the plaintiff and against the defendants in the sum of Thirteen hundred ninety-nine & 23-100 dollars (\$1399.23), The Court discharges the jury from further consideration of this case."

On the next day, defendants filed a motion for a new trial, and a motion for a judgment *non obstante veredicto*. The court denied the motion for a new trial, and granted the motion for a judgment, which was accordingly entered and from which plaintiff has appealed.

Prior to 1903, the law was that judgments in jury cases should be entered within five days after the filing of the verdict,

" . . . unless a motion for a new trial shall have been filed, or unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. In all other cases the judgment shall be entered on the day when it is given." Laws 1891, pp. 76, 77.

In 1903, the law was, by amendment and repeal of contrary sections, made to read as follows:

"When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict, and a transcript of said judgment may be immediately filed in the office of the clerk of the superior court of any other county in the state in the manner provided by law: Provided, however, that if a motion for a new trial shall be filed, execution shall not be issued upon said judgment until said motion shall be determined: And provided, further, that the granting of a motion for a new trial shall immediately operate as the vacation and setting aside of said judgment." Laws 1903, p. 285; Rem. & Bal. Code, § 431 (P. C. 81 § 729).

Assuming that the entry above quoted is a sufficient entry of a judgment, the question is submitted whether a motion for a judgment *non obstante veredicto*, or any motion other than a motion for a new trial, can be made or entertained by the court after the entry of a judgment upon the verdict.

A motion for a judgment *non obstante veredicto* is a crea-

ture of the common law. It is now entertained only in so far as it has been defined and assigned a particular function in our code of procedure. Rem. & Bal. Code, § 387 (P. C. 81 § 681). The motion has come into frequent use and has been, to a greater or less extent, abused and misunderstood. At common law it was never entertained after the entry of a judgment. "If the motion was filed after a judgment was entered, it came too late." *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338; 2 Tidd's Practice, p. 928; 23 Cyc. 781; Freeman, Judgments, § 7.

In *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109, which is one of the first of our cases which discusses judgments *non obstante veredicto*, it appears that "Respondent immediately moved for a new trial, and by a separate motion also asked for judgment notwithstanding the verdict." Nor does the statute make the motion in any way dependent upon or concurrent with a motion for a new trial. The only right to move after the entry of a judgment is the statutory right to move for a new trial (Rem. & Bal. Code, § 431), or to vacate the judgment under Title III, chapter XVII, Rem. & Bal. Code. We have had occasion but recently to call attention to the fact that the motion should not be employed unless a verdict is so contrary to law, or taking the evidence as undisputed, a judgment could not be entered. In the *Roe* case, the court said:

"It is the proper practice for a trial court, upon the hearing of a motion for judgment *non obstante veredicto*, to enter final judgment in favor of either party where it is warranted by the undisputed evidence."

In *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166, we said:

"The motion for judgment notwithstanding the verdict invokes no element of discretion. It invokes the pure judicial functions of the trial court and of this court on review. It

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can only be granted when the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict."

Auwarter v. Kroll, 79 Wash. 179, 140 Pac. 326, is a case in point. The court below rendered judgment *non obstante*. This court held this to be error, saying:

"We can divine no reason—certainly none is apparent in the record—for the order of the court, except that the judge was of the opinion that the verdict was contrary to the weight of the evidence. If so, his power was limited to making an order granting a new trial."

Our holding is no new conception. The rule is general and is as old as trial by jury. 11 Ency. Plead. & Prac., 917.

While the rendition of a judgment is a judicial function, its entry is a ministerial act, and as verdicts are received by the court, the legislature violated no provision of our constitution when it provided that the clerk should enter judgment on the verdict when it is returned. Unless the judge reserves judgment or directs that it be not entered, judgment should be entered at once. It is rendered when the verdict is pronounced by or in the presence of the court. If this is not the true construction of the statute, it is impractical and could be defeated at will.

But it is contended that the judgment relied on is no judgment; that it lacks formality and is not signed by the judge, or if it is entered in the journal the record does not show that the journal was signed by the judge for the day proceedings were had, and for that reason the motion was filed in time. It is not essential that judgments rendered and entered on verdicts should be drawn with the formality of other judgments and decrees. To so hold, would be to nullify the statute in many cases.

"The act, after the trial and final submission of a case, of pronouncing judgment in language which finally determines the rights of the parties to the action and leaves nothing more to be done except the entry of the judgment

by the clerk constitutes the rendition of a judgment. No particular form is required in the proceedings of a court to render them an order or judgment. It is sufficient if they are final. . . . The rendition and entry of a judgment are entirely different things. The first is a purely judicial act of the court alone, and must be first in the order of time, while the entry is merely evidence that a judgment has been rendered, and is purely a ministerial act. . . . In practice it would seem that a judgment on verdict is rarely if ever announced by the court in legal actions, since it follows so naturally and necessarily that it is taken for granted. In some of the states statutes prescribing the procedure upon the coming in of a verdict in a trial by jury expressly make it the duty of the clerk to enter a judgment in conformity with the verdict, unless a different direction be given by the court." 18 Ency. Plead. & Prac., pp. 429-432.

Sec, also, 23 Cyc. 835, 836.

The point is made that the court had no power to render a judgment after the first judgment had been entered by the clerk; that the second judgment would not operate as a vacation of the judgment upon the verdict. In this regard, this case is controlled by the case of *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338, and the cases therein cited.

We have discussed the legal propositions involved in this case because of the confusion in the practice with reference to the entry of judgments upon verdicts and the use of the motion for judgment notwithstanding the verdict; but we have felt that, for the very reason that the practice has not been always understood, it was our duty to look into the facts of the case to ascertain whether or not the final judgment rendered by the court could be sustained. The complaint states a cause of action for deceit, worked, as it is alleged, by the defendants, in the purchase of certain electric motors. The defendants were to buy motors from the Seattle Electric Company at a list price. They were bought at a less rate. Defendants had use for large motors and the plaintiff had use in his business for small motors. Plain-

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tiff agreed to take all of the motors purchased by the defendants up to and including those of three horse power. He was to pay the amount paid by the defendants, or, as the transaction actually occurred, furnish a part of the purchase price. Defendants answered by general denial.

There are three suggested reasons for sustaining the judgment of the lower court and for denying the plaintiff the benefit of his verdict and judgment. Plaintiff admitted that he was told, before the trade was consummated, that the motors could be purchased for a less sum of money than he paid; that he had heard that the motors could be purchased for less money; but he says that, when he took the matter up with defendants, they quieted his suspicions and made him believe that they were paying the full price to the electric company. Plaintiff is corroborated by two witnesses who testified to conversations in which their deceit was admitted.

The next possible reason is that the price paid by defendants to the electric company is stated in a conditional bill of sale, which was made of record in the county auditor's office. Obviously, this cannot be notice to the plaintiff or enough to put him upon his inquiry, if he had notice of it. Our recording acts are designed to protect titles. The statement of a consideration in an instrument offered for filing is only *prima facie* evidence of the true consideration. If it were not so, and plaintiff had made inquiry, he would probably have been quieted by the same assurance that satisfied him when he took the matter up with the defendants upon oral rumor.

Another possible reason is that the court believed that the attorney whom plaintiff had employed in the transaction had notice of the amount that was actually paid to the electric company. We have read the testimony of the attorney and we are not sure that he ever communicated such notice to the plaintiff. Plaintiff says that he did not. The jury has a right to believe the plaintiff, and evidently did so. This is conclusive on the disputed facts, unless the knowl-

edge of the attorney is binding upon the plaintiff in any event. The attorney was employed, as it appears without contradiction, to see that plaintiff got title to the motors. He was not a party to the trade; he was not bound to concern himself with the purchase price or to communicate any knowledge he might have with reference thereto to his client. He would probably have been officious if he had done so.

On the facts, the case falls within the *Wagner* and *Brown* cases.

Remanded with directions to vacate the judgment entered *non obstante veredicto*.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11909. Department One. August 11, 1914.]

SEATTLE CONSTRUCTION AND DRY DOCK COMPANY, *Respondent*, v. FRED W. NEWELL *et al.*, *Appellants*.¹

CONTRACTS—MUTUALITY—OPEN BIDS—WITHDRAWAL BEFORE ACCEPTANCE. Contractors submitting a bid for construction work under an invitation therefor containing a reservation of the right to reject any and all bids received, may withdraw the same at any time before acceptance, since the bid was no more than a proposal, and there could be no mutuality or contract relation until the acceptance of the bid.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 10, 1913, upon findings in favor of the plaintiff, in an action for an injunction. Affirmed.

Shorett, McLaren & Shorett, for appellants.

Bogle, Graves, Merritt & Bogle, for respondent.

CHADWICK, J.—The plaintiff tendered a bid for the construction of a dredge for the defendants Commissioners of Commercial Waterway District No. 1, King county, state

¹Reported in 142 Pac. 481.

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of Washington. On December 7, plaintiff gave notice that it withdrew its bid. On December 10 "On motion, the board voted to reject all bids on dredging and dredge." On December 14, the defendant commissioners gave notice to plaintiff that its bid was accepted and that it would be required to enter into a formal contract within ten days. This plaintiff refused to do, and an order was entered by the commissioners forfeiting a certified check for the sum of \$8,000 which had accompanied the bid. Whereupon this action was brought to restrain the commissioners from cashing or transferring the check. After due trial, the court entered a decree in favor of the plaintiff, and defendants have appealed.

The defendants have undertaken to show that, at the time bids were received, it could not, because of certain legal proceedings then pending, lawfully enter into a contract, and that this was understood by the plaintiff. The officer of plaintiff having the matter in charge disputes this testimony. It is also insisted that the record showing a rejection of all bids was not intended to apply to plaintiff's bid. But whatever the fact may be, the only question is the legal question whether one who has submitted a bid can withdraw it at any time before it is accepted by the one calling for the bid.

An open bid to do a certain thing, the one receiving the bid having reserved the right to reject any and all bids, is no more than a proposal. It creates no contract relation until it is formally accepted, and pending that time, the proposer is free to withdraw his proposal, unless there be some contravening statute. *Molloy v. New Rochelle*, 123 App. Div. 642, 108 N. Y. Supp. 120.

It has been held that, where bids are called for to be let to the lowest bidder, a contract right is created, and that the contracting body cannot reject the bid at will but may be compelled to enter into a formal contract. *McQuillin, Municipal Corporations*, § 1229. To avoid this rule, agents contracting for the public, as well as individuals, have come

to reserve the right to reject any or all bids. "The rule between individuals is that until the proposal is accepted it may be withdrawn"; for, as is said in *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U. S. 373, "the transaction had not reached the degree of a contract—a proposal and acceptance." Where there is a reservation on the part of a municipality to reject any and all bids, there can be no mutuality until the bid is accepted, and until it is accepted, the proposer is under no obligation to keep it good, but may withdraw it. To say that a municipal corporation may reserve its right to reject a bid which, in their judgment, may be too low to insure good work or involve a moral hazard that in their judgment it would be unwise to assume, and to hold a bidder bound in such cases before acceptance, would be to say that mutuality is not an essential in contracts in which the public is concerned. The right of a municipality to postpone the time when negotiations may become effective as a contract is sustained by the greater weight of authority. *McQuillin, Municipal Corporations*, § 1228. In the case of *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231, we upheld the right of the city council of the city of Spokane to exercise an almost plenary power in the matter of refusing to contract under an invitation reserving the right to reject any and all bids. In that case, the bidder was insisting upon his right of contract upon the ground that his bid was the lowest bid and that he was a responsible party. We quoted from the case of *Anderson v. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707, wherein it is said:

"Whatever its rules or practice, as to the acceptance of bids may have been, plaintiffs' rights can not be justly held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract; but an offer to receive proposals for a contract."

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The cases cited and relied upon by the defendants are to be distinguished in this, that the negotiations of the parties had so far progressed that the court could say that the transaction had assumed the status of a contract.

Affirmed.

Crow, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11924. Department Two. August 11, 1914.]

NASON & COMPANY, *Appellant*, v. JOHN F. STACK,
Respondent.¹

CHATTEL MORTGAGES—STOCK OF GOODS—PERMITTING SALES—REDUCTION OF DEBT—VALIDITY. A chattel mortgage of a stock of goods providing that the mortgagor might reduce said stock of goods as low as \$12,000, but in such event one-half the reduction should be paid to the mortgagee on his note and mortgage, is not void nor fraudulent as to creditors unless given for the purpose of aiding the debtor in defrauding such creditors.

SAME—PROVISION FOR RETENTION OF PROCEEDS—VALIDITY. The provision permitting the mortgagor to retain one-half the proceeds of sales which reduced the stock to \$12,000 is not shown to have been included for the purpose of defrauding creditors, where the only evidence as to intent of the parties in including the provision in the mortgage was that of the mortgagee, who construed it as meaning that he was to receive one-half the proceeds in case the stock should be reduced to \$12,000, and that the payment of one-half the reduction to the mortgagee would leave ample funds in the hands of the mortgagor to carry on the business and meet current bills; the stock, though reduced, being considered ample in amount for the protection of all parties interested.

SAME—PROCEEDS OF SALE—ACCOUNTING—PAYMENT OF MORTGAGE. A provision in a chattel mortgage of a stock of goods permitting the mortgagor to reduce its stock as low as \$12,000, but in event of such reduction one-half the proceeds should be paid to the mortgagee on his note and mortgage, does not make the mortgagor the agent of the mortgagee to receive the proceeds of sale for application on the mortgage indebtedness, and thereby require an accounting by the mortgagor and a reduction of the mortgage by one-half the proceeds of such sales whether paid to the mortgagee or not.

¹Reported in 142 Pac. 477.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered November 4, 1913, upon findings in favor of the defendant, in an action to declare void a chattel mortgage. Affirmed.

Sharpstein & Sharpstein, for appellant.

John C. Hurspool and Rader & Barker, for respondent.

MORRIS, J.—In August, 1912, respondent Stack was the owner of a paint and paper store, at Walla Walla, and during that month sold the business to George C. Wilson, for the sum of \$16,000. On the 27th day of August, Wilson executed to Stack a mortgage for \$4,000, to secure the remainder of the purchase price. The validity of this mortgage is the question submitted by the appeal, it being contended, (1) that the mortgage was void in that it allowed the mortgagor to remain in possession of the stock and sell the same at retail without providing that he should account to the mortgagee for the proceeds of such sales; (2) that the mortgage is void, even though it should be construed to provide that the mortgagor should account for the proceeds of the sales to the mortgagee; and (3) that, if it should be held that one-half of the proceeds of the stock of goods should be accounted for and applied on the mortgage, then the court should have ordered an accounting to ascertain the value of the goods sold by the mortgagor, and should have reduced the mortgage indebtedness by one-half of such amount so sold whether received by the mortgagee or not.

The provision in the mortgage which gives rise to these several contentions is as follows:

“It is further agreed by the parties to this mortgage that the said George C. Wilson may reduce said stock of goods this day mortgaged to as low as \$12,000, but in the event said stock is reduced, an amount equal to one-half of the reduction shall be paid to the said John S. Stack on this said note and mortgage, said reduction to be determined by the invoice thereof.”

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This mortgage was given to respondent Stack to secure the balance due him on the purchase price of the stock and fixtures contained in the store. Shortly after the sale to Wilson, Stack left Walla Walla, and between that time and July, 1913, he visited the store approximately once a month; but it does not appear that there was anything to apprise him of the fact that Wilson was not complying with the provisions of the mortgage, until July, 1913, when a trade of the stock with a Mr. Borne was contemplated, and Stack was asked by Wilson to come to Walla Walla and arrange for the transfer of the lease and mortgage. He then learned that some of Wilson's bills payable were long past due, that his creditors were objecting to further extension of credit, and that an inventory had been taken of the stock showing the value of the stock on hand to be \$13,200. He immediately took steps to obtain the money due him. We cannot find that, up to that time, he had knowledge that Wilson was not keeping up the stock. The value of the stock and fixtures at the time of the sale to Wilson was \$16,000. A year later it was \$2,800 less.

We held, in *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604, that a chattel mortgage was not void because it permitted the mortgagor to remain in possession and dispose of the goods at retail, appropriating part of the proceeds of such sales to replenishing the stock and paying current expenses of the business, instead of applying all of the proceeds to liquidation of the mortgage; nor was such a mortgage fraudulent as to other creditors unless it appeared that it was given to aid the mortgagor in defrauding such creditors, and that the fraudulent character of the mortgage, when assailed as such, must be determined as a fact. This rule was followed in *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459, 34 Am. St. 851; *Sanders v. Main*, 12 Wash. 665, 42 Pac. 122; *Dillon v. Dillon*, 13 Wash. 594, 43 Pac. 894; *Adams v. Dempsey*, 22 Wash. 284, 60 Pac. 649, 79 Am. St. 933; *Id.*, 29 Wash. 155, 69 Pac. 738; *Van*

Winkle v. Mitchum, 66 Wash. 296, 119 Pac. 748. These cases are controlling as to the validity of this mortgage, the stipulation in this mortgage being in effect that, if the stock be reduced as low as \$12,000, one-half of the proceeds of the stock so sold should be accounted for and paid to the mortgagee. In this case there were no other creditors at the time the mortgage was given, and no fact appears that would attach any fraudulent intent. In this respect, the case is not apposite to those cases where an attempt is made by an insolvent debtor to prefer one creditor over another.

Upon the second contention, the only evidence in the case as to intent of the parties in including the provision for the reduction of the stock to \$12,000, but providing that one-half of the reduction should be paid to the mortgagee, is that of Stack, who construed it as meaning that he was to receive one-half of the proceeds of sales in case the stock should be reduced to \$12,000. That reduction was the limit and, so far as we can observe, there is nothing to gainsay respondent's position that it was considered that a \$12,000 valuation would represent all the stock required in the business, and that the payment of one-half of this reduction to the mortgagee would leave ample funds in the hands of the mortgagor to carry on his business and meet his current bills. In this regard, the mortgage provides that the stock shall be kept up so that at all times it will invoice at least \$12,000, this amount evidently being considered at the time as ample for the protection of all parties interested. There is nothing from which we can hold, as contended by appellant, that permitting the mortgagor to retain one-half of the proceeds of sales which reduced the stock to \$12,000 deprived the creditors of the right to collect their indebtedness out of the property unless they were prepared to take care of the mortgage. Nor do we, in sustaining this mortgage, have to approximate the percentage of reduction beyond which it would not be proper to go. It is enough to say that, in this case, we find nothing requiring us to hold

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that, because of the provision contained in this mortgage, it must be held invalid.

On the third contention, appellant's argument is that, if the mortgagor was bound to account for one-half of the proceeds of sales, then the mortgagor was the agent of the mortgagee in releasing each separate item as sold from the lien of the mortgage and accounting to the mortgagee of the proceeds; and that, under *Warren v. His Creditors*, 3 Wash. 48, 28 Pac. 257, an accounting should have been ordered and the mortgage reduced by one-half of the proceeds of such sales, whether paid to the mortgagee or not. An accounting was ordered in the *Warren* case because the mortgage was given to secure the mortgagee against liability as joint maker with the mortgagor of certain notes to third parties; and while the facts showed such a liability existed, it did not appear that such liability had become absolute, or how much, if anything, would be due the mortgagee on account of any payment he was compelled to make as joint maker on the notes. For this reason, it was held that the matter could not be properly determined until further proof should establish the extent of this liability, and an accounting was ordered to ascertain this amount; and since the only power of sale in the mortgage was for the benefit of the mortgagee, the proceeds of such sales should be, on such account, charged to the mortgagee, whether received or not. In other words, the mortgagee had constituted the mortgagor his agent to receive these amounts for application on the mortgage indebtedness, and having done so, must give credit for all such amounts so received by his agent. We do not think that such a rule should obtain here, since the reasons for its announcement are lacking.

We have not attempted to discuss the cases cited by appellant, some of which apparently support his contentions. They are from states recognizing a different rule from that obtaining here. We prefer to follow the rule, well established in this state, that, in the absence of any showing of

fraud or any intent to in any manner hinder or delay other creditors, mortgages of this character should be sustained as representing an attempt between debtor and creditor to secure the payment of honest debts.

The judgment is affirmed.

Crow, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 11930. Department Two. August 11, 1914.]

WALTER A. KEENE, *Respondent*, v. M. P. ZINDORF *et al.*,
Appellants.¹

LANDLORD AND TENANT—LEASE—TERMINATION—NOTICE OF FORFEITURE—NECESSITY. The rights of a lessee to exercise an option to purchase are not terminated through default in the payment of rent, the last installment of which was due April 1, under a lease providing that, upon nonpayment of the rent or any portion thereof, or within thirty days thereafter, the lessors could elect to forfeit the lease, and that the lessee "waives notice of termination of the lease and all demand for payment of rent or possession," and that the lessee had the option of extending the lease for a period of forty years from September 1, 1913, the end of the original term, at a yearly rental of one dollar, and could elect to purchase the property at any time during the period of extension, provided the election to extend the lease was made, whereupon the lessors would deed the property for a consideration of \$100, where the lessee, before the expiration of the term, though after the final installment of rent became due, tendered sufficient money to pay the rent and also \$100 as the purchase price of the property, at the same time notifying the lessors that he elected to extend the lease and purchase the property, it further appearing that the lessors had never declared the lease at an end, nor by any overt act indicated an intention to claim a forfeiture for failure to pay the rent when due; since the forfeiture clause in the lease would not automatically terminate the purchaser's rights upon default, in the absence of some declaration or claim of forfeiture on the part of the lessors.

SAME—LEASE—EXTENSION—OPTION TO PURCHASE—TIME FOR EXERCISE. In such case, the lessee having preserved his rights under the contract by tender of the final installment of rent before declaration or claim of forfeiture by the lessors, his notice of election to ex-

¹Reported in 142 Pac. 484.

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tend the lease and purchase the property entitled him to a deed therefor.

SAME—LEASE—EXTENSION—OPTION TO PURCHASE—TENDER—SUFFICIENCY. Where the lessee paid the final installment of rent a considerable time after it was due, but preserved his rights under the lease on account of failure of the lessors to declare a timely forfeiture for nonpayment of rent, he is not bound, when tendering the rent, to include therein interest from the time it became due, where several previous payments of rent were made a considerable time after they were due, and were accepted without demand for interest, the parties apparently had no thought of interest or a demand therefor when the tender was made, and no objection was made to the amount thereof, and the lessee's tender, deposited in court for the benefit of the lessors, was more than sufficient to cover interest which might be claimed.

SAME—RENT—TIME FOR PAYMENT. Under a lease providing for an extension thereof for a period of 40 years, at the option of the lessee, at a yearly rental of one dollar and the payment of taxes, it was not necessary for the lessee, on electing to extend the lease, to tender the first year's rent, since, in the absence of an agreement to pay in advance, rent is payable at the end of each rental period.

ALIENS—OWNERSHIP OF LAND—PARTIES ENTITLED TO OBJECT. Grantees of an owner who leased the property to an alien, a Japanese citizen, cannot resist claims to the property in a suit for specific performance brought by an assignee of the lessee, an American citizen, on the constitutional ground that ownership of lands by aliens is prohibited in this state.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 13, 1914, upon findings in favor of the plaintiff, in an action for specific performance, tried to the court. Affirmed.

John W. Roberts and George L. Spirk, for appellants.

Walter A. Keene, *pro se*, respondent.

PARKER, J.—The plaintiff seeks to enforce conveyance by defendants of certain real property, in Seattle, in compliance with a lease containing an option to purchase the property, given by Anna M. Zindorf, the defendants' grantor, to Saburo Hisamidzu, consul for the Japanese Empire at Seattle, to whose rights the defendants have succeeded by assignment.

A trial resulted in judgment requiring the defendants to execute and deliver to the plaintiff a good and sufficient quitclaim deed for the property; and, upon their neglect or refusal so to do, appointing the clerk of the superior court a commissioner to execute and deliver to plaintiff such a deed; also directing the clerk of the superior court to pay to the defendants the sum of \$601, tendered and paid into the court by the plaintiff for the use of the defendants as the balance of the rent and purchase price of the property. From this disposition of the cause, the defendants have appealed.

There is no dispute worthy of serious consideration concerning the facts which we regard as determinative of the rights of the parties. The lease containing the option to purchase, in so far as we are here concerned with its terms, reads as follows:

"This indenture, made this 19th day of August, 1903, between Anna M. Zindorf, a feme sole of county of King and state of Washington, party of the first part, and Saburo Hisamidzu, Consul of the Japanese Empire at Seattle, Washington, party of the second part, witnesseth:

"That the said party of the first part, in consideration of the covenants of the said party of the second part hereinafter set forth, does by these presents lease and demise to said party of the second part the following described property, to wit: . . .

"To have and to hold the same to the said party of the second part from the first day of September, 1903, to the first day of September, 1913.

"And the said party of the second part, in consideration of the leasing the premises as above set forth, covenants and agrees with the party of the first part to pay to the said party of the first part, as rent for the same, the sum of twelve thousand (\$12,000) dollars, payable as follows, to wit: One hundred (\$100) dollars on September first, 1903, and six hundred (\$600) dollars on October first, 1903, and six hundred (\$600) dollars on each and every first day of October and the first day of April thereafter up to and including the first day of October, 1912, and five hundred (\$500) dollars on the first day of April, 1913.

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" . . . upon the nonpayment of the whole or any portion of the said rent, or within thirty (30) days thereafter, the said party of the first part may, at her election, either distrain for said rent due, or declare this lease at an end and recover possession as if the same were held by forcible detainer; the said party of the second part hereby waiving any notice of such election, or any demand for the possession of said premises . . .

"The party of the second part waives notice of the termination of this lease under any of its provisions, and all demand for payment of rent or possession. . . .

"The party of the first part also agrees to pay all state, county and municipal taxes on said property hereby leased and all charges for local improvements now assessed against the same, but the party of the second part will pay all charges and assessments for local improvements which may hereafter be assessed against the same . . .

"It is further agreed that the party of the second part and his assigns or successor in interest shall have the right at his election to extend said lease for a period of forty (40) years from September 1st, 1913, at a yearly rental of one (\$1) dollar and the payment of all taxes during the period of such extension. Said election may be exercised at any time on or before September first, 1913. . . .

"It is further agreed that should the party of the second part, or his assigns or successor in interest, desire to purchase said property at any time after September first, 1913, and during the period of extension of this lease, (provided the party of the second part has elected to so extend the same) the party of the first part will deed the same to him by a good and sufficient quit-claim deed for a consideration of one hundred dollars . . .

"It is also agreed that on the first day of September, 1913, if all payments of lease money as herein contemplated shall have been made, all buildings, out-houses, improvements and movable property of every kind and character situated on said real estate herein leased shall be and become the absolute property of the party of the second part and may be removed by him, his assigns or successor in interest, within a reasonable time thereafter . . .

"The covenants herein shall extend to and be binding upon the heirs, executors, administrators, assigns and successors in interest of the parties to this lease."

On September 23, 1908, Anna M. Zindorf, by deed duly executed, conveyed the property to appellants, by which conveyance they became the owners thereof, subject to the rights of respondent and his predecessors in interest under the lease and option to purchase. On October 4, 1911, Hisamidzu, the lessee, duly sold and assigned to Seiichi Takahashi the lease and option to purchase. On the 22d day of August, 1913, Takahashi duly sold and assigned to the respondent the lease and option to purchase. Hisamidzu, the original lessee, and his successors in interest under the lease and option to purchase, have kept and performed all the terms and conditions on their part to be performed, including the payment of \$1,447 of local assessment charges levied against the property, and the payment of \$11,500 of the agreed rental up until the first day of April, 1913, when the final installment of rent of \$500 became due.

In August, 1913, before the expiration of the original ten-year term specified in the lease, respondent, the then owner of the lease and option to purchase, tendered to appellants \$500 in gold coin as and for the final payment of the rent due for the original ten-year period; also tendered to appellants the further sum of \$100 in gold coin as and for the purchase price of the property, and served upon each of them a written notice, notifying them, in substance, that he had become the owner by assignment of the lease and option to purchase; that he elected to have the lease extended for the further period of forty years as therein provided, and that he elected to purchase the property under the option given by the terms of the lease, and demanded that they execute to him a deed therefor. Appellants refused to accept these tenders, or either of them, and refused to convey the property as demanded. Neither these tenders nor the execution of the deed were refused by appellants because of the insufficiency of the amount

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of the tender, but evidently because appellants regarded respondent's rights under the lease and option to purchase as being terminated by virtue of his default in payment of the last rent installment and also because they regarded the lease and option as void on account of the original lessee being an alien. Up to the time of the actual making of this tender, neither appellants nor their grantor had ever in any manner declared the rights of respondent or his predecessors under the lease and option to purchase as forfeited or at an end. In the language of the trial court in its findings, they had "never, at any time, made any declaration of forfeiture to anyone, and never, at any time, did any overt act of any kind whatsoever in the way of forfeiting said lease, or indicating that a forfeiture thereof had been declared by them, or that they intended to declare a forfeiture thereof or had forfeited said lease." There is no room for controversy as to this fact.

Takahashi has, at all times, remained in possession of the property under respondent since the assignment of the lease and option to purchase to respondent, and no attempt has been made on the part of appellants to interfere in the least with the full enjoyment of the property by respondent. Respondent claims to have tendered \$1 to appellants together with his other tenders, as and for one year's rental of the property, immediately following the original ten-year period, being rental for the first year of the extended term. There being some conflict in the evidence touching the making of this tender, we shall not assume that it was actually made, since, as we proceed, we think such fact will be found to be immaterial. Respondent has kept his tender good by depositing in court at the time of the commencement of this action, the sum of \$680, being more than sufficient for that purpose.

The principal contention of counsel for appellants seems to be that the lease, and all of the respondent's rights thereunder as lessee, came to an end upon default of payment of the rent, before the tender by him of the last installment of

\$500, due upon the rent of the original ten-year period, and that respondent thereby lost his right to purchase the property under the option contained in the lease. It may be conceded that respondent's right to purchase the property is dependent upon the continuation of the lease and his rights thereunder as lessee until the end of the original ten-year term and an effective election on his part to extend the lease for the additional term provided for therein, since his right to purchase the property seems to be confined to the "period of extension of this lease" provided it be effectually extended; though he could elect to purchase, give appellants notice thereof, and tender to them the \$100 therefor at any time during the original ten-year period.

We have seen that, a short time before the expiration of the original ten-year period, respondent tendered to appellants the \$500 due as the last installment of the rent for the original ten-year period; that he elected to extend the lease, and gave appellants due notice thereof; and that he elected to purchase the property, gave appellants due notice thereof, and tendered the \$100 on the purchase price. All of this, it is true, was done some time after the final \$500 rent installment became due; but it is also true that, up to the time of the tender, appellants did not "declare this lease at an end" by any overt act whatsoever; nor was the enjoyment of the property by respondent sought to be interfered with. If respondent's rights were at an end as lessee at the time of, and prior to, these tenders and election made by him, it is because the lease and all of respondent's rights thereunder automatically terminated upon his default of the payment of the \$500 rent when it became due, without any declaration or claim of forfeiture whatever on the part of appellants. Such seems, in its last analysis, to be the contention of appellants' counsel. So far as the option to purchase contained in the lease is concerned, we may concede that it would automatically expire if not exercised within the original ten-year term of the lease or its effective extension; but the question

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of the automatic termination of the lease is quite another problem; hence we recur to that, the real question in this branch of the case.

Counsel for appellants rely upon, as the automatic terminating provisions of the lease upon default in the payment of rent, the following provisions thereof:

" . . . upon the nonpayment of the whole or any portion of the said rent, or within thirty (30) days thereafter, the said party of the first part may, at her election, either distrain for said rent due, or declare this lease at an end and recover possession as if the same were held by forcible detainer; the said party of the second part hereby waiving any notice of such election, or any demand for the possession of said premises . . .

"The party of the second part waives notice of the termination of this lease under any of its provisions, and all demand for payment of rent or possession."

Viewed superficially, these provisions may seem far reaching in the direction claimed by counsel, but we are constrained to hold that they go no further than to deprive respondent, as lessee, of the privilege of previous notice of an intention on the part of appellants to put an end to the lease by so declaring. Forfeiture provisions in contracts, other than mere options, are generally held to be for the benefit of one of the parties, and not to operate in favor of such party unless he takes some affirmative action claiming his rights thereunder. At the time of the tender, the termination of this lease was still to be accomplished by the declaration of appellants, and the mere fact that they had the privilege of so declaring did not terminate the lease. That was a right they could exercise or not as they chose, and the fact that they might exercise such right without notice to respondent, does not change the fact that, until it is exercised in some overt manner, the lease will still live. In *Lane v. Brooks*, 120 Ill. App. 501, there was involved a lease containing a forfeiture clause as follows:

"If default be made in the payment of the rent above reserved or any part thereof, or in any of the covenants of said lease by the lessee, it shall be lawful for the lessor, at any time thereafter, at his election, *without notice or demand of rent*, to declare said term ended and to re-enter said demised premises or any part thereof, either with or without process of law . . ."

Answering the contention that default in payment of rent under such lease terminated the lessee's right without any declaration or claim of forfeiture made on the part of the lessor, the court very pertinently observed:

"Under the provisions of this lease the nonpayment of rent did not put an end to the lease or to the term thereby created. The lease gave to the landlord a continuing option at his election to declare the term ended in such case. But he could not make this election and put an end to the term by any secret resolve of his own mind, any more than can one to whom an offer or proposal is made accept the same and make a contract by mere 'mental assent' to such offer or proposal."

This view finds support in the following authorities: *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. St. 222, 18 Atl. 721, 5 L. R. A. 603; *Hartford Wheel Club v. Travelers Ins. Co.*, 78 Conn. 355, 62 Atl. 207; *Williams v. Beach Pirates Chemical Engine Co.*, 73 N. J. L. 446, 63 Atl. 990; *Blank v. Independent Ice Co.*, 153 Iowa 241, 133 N. W. 344; 2 Tiffany, Landlord & Tenant, p. 1402; 1 Underhill, Landlord & Tenant, § 394. In the text of 24 Cyc. 1357, it is said:

"Inasmuch as it is optional with the lessor whether to avail himself of the breach of a covenant by declaring a forfeiture, it follows that if the lessor desires to forfeit he must manifest his intent by some clear and unequivocal act during the term."

Upon this principle, this court, in *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822, held that a forfeiture clause making time of payment the essence of a land purchase contract would not automatically terminate the purchaser's rights

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upon default, in the absence of some affirmative claim of forfeiture on the part of the seller. In so holding, the court observed:

"It is said that, in order to make a case, the respondents must prove that all of the payments due under the contract up to the time of the final tender were paid or tendered at the time they fell due, as time was made of the essence of the contract, and a forfeiture occurred as of course on default of any payment. We cannot so construe the contract. This clause in the contract did not, of itself, forfeit the contract in equity simply because a payment was not made immediately on its falling due. Undoubtedly the party agreeing to make the sale could declare a forfeiture, and cut off the right of the other party to make the payments, but it required some affirmative action on his part. If he remained passive until the other party made tender of payment, he was obligated to accept it and to perform his part of the contract."

We are of the opinion that respondent's rights under the lease had not terminated at the time he tendered to appellants the \$500, as and for the final installment of rent due for the original ten-year term, though that tender was made some considerable time after it became due, since appellants had never declared the lease at an end, nor by any overt act indicated their intention to claim a forfeiture of the lessee's rights thereunder. Such tender, therefore, had all the effect in preserving respondent's rights as lessee as if made on the day the final installment became due. *Moran v. Lavell*, 32 R. I. 338, 79 Atl. 818, Ann. Cas. 1912 D. 1007; *Lewis v. St. Louis*, 69 Mo. 595; 24 Cyc. 1353. Our own decisions are in harmony with this view, though we have none involving directly such forfeiture clauses in lease contracts. *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495; *Zeimantz v. Blake*, *supra*; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002. The lease, and respondent's rights as lessee thereunder, being preserved by the

tender of the final installment of \$500 upon the rent of the original ten-year period before declaration of forfeiture by appellants, it follows that his election to extend the lease and purchase the property under the option contained in the lease, and his tender of \$100 on the purchase price, were effectual and entitled him to a deed for the property.

It is contended, however, that respondent's tenders were, in certain respects, defective and not such as preserved his right either as lessee or his right to purchase under the option. It is insisted that the tender of the \$500 as the final payment due upon the rent for the ten-year period was insufficient in that it was made some few months after the time it became due, and was, therefore, deficient because not accompanied with an amount to cover interest thereon from the time it became due. Assuming that appellants were entitled to interest had they demanded it, it would have amounted to approximately \$12. Looking back over the history of the payments made from time to time during the ten-year period, we find that, on several occasions, they were made some considerable time after they became due, and were accepted by appellants and their grantor without any demand for interest, and apparently without any thought of interest on the part of respondent or his predecessors in interest. All parties manifestly had no thought of interest or a demand therefor at the time of the tender of the \$500, as the final rent installment. Appellants have resisted plaintiff's claims not because of insufficiency of tender so far as its amount was concerned, but have assumed an attitude clearly manifesting that they would not have accepted a tender in any amount. When respondent commenced this action, he not only kept his tender good in the amount he had previously tendered, but he kept it good by depositing in court that amount and an additional sum for the benefit of appellants more than sufficient to cover the interest which might be claimed by appellants upon the deferred rent installment. Appellants cannot now invoke the insufficiency of the tender so far as its amount is concerned.

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Ziemantz v. Blake, supra; Livieratos v. Commonwealth Security Co., 57 Wash. 376, 106 Pac. 1125.

It is also insisted that there was no tender of the \$1 in connection with respondent's election to extend the lease beyond the original ten-year term. Counsel's theory seems to be that, to extend the lease beyond the original ten-year term, required not only an election so to do on the part of respondent, but also a tender of the first year's rent amounting to \$1. We have noticed that there was some dispute in the evidence as to whether such tender had been made, and therefore we regard it as not having been made. Counsel's contention finds a complete answer in the fact that the annual rent of \$1 per year for the extended term is not payable in advance. The law seems to be well settled that, in the absence of an agreement to pay in advance, rent is payable at the end of each rental period. Such rental period being one year, under the extended term, manifestly no rent in any event would become due until the end of the first year of the extended term. Hence, it was wholly unnecessary for respondent to make any tender of payment of rent when he elected to extend the lease. 18 Am. & Eng. Ency. Law (2d ed.), 270. The notice given to appellants by respondent was sufficient, of itself, to secure that right to respondent. Indeed, the only purpose of respondent in extending the lease was evidently to remove all question as to his right to purchase, since that right seems to depend on there being a valid extension, and that right being claimed and tender of purchase price being made at the beginning of the new term, no rent would ever become due thereon.

Hisamidzu, the original lessee, and also Takahashi, his assignee, are not citizens of the United States, nor have they declared their intention to become such, but are citizens of Japan. This fact, counsel for appellants contend, rendered the lease and option void, in that it was in violation of the provisions of our constitution, that "the ownership of lands by aliens . . . is prohibited in this state . . ." That

this Japanese's lessee and his assignee are within the prohibited class under our constitution may be conceded. Counsel rely upon the decisions of this court in *State ex rel. Winston v. Morrison*, 18 Wash. 664, 52 Pac. 228; *State ex rel. Winston v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430, and *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, 74 Pac. 686. The *Morrison* and *Hudson Land Co.* cases were prosecuted by the state directly against alien owners, in which cases the constitutional provision was given full force. The *Morrell* case was an eminent domain proceeding wherein an alien corporation, that is, alien in effect because of the ownership of its stock being in aliens, sought to acquire land from a citizen by condemnation. In that case, there was no attempt on the part of the defendants in the eminent domain proceeding to avoid any contract or conveyance theretofore made by him; hence there was no element of estoppel whatever available against him. He was not seeking to acquire back that which he had voluntarily conveyed away to an alien, but he was simply resisting the claims of an alien corporation which, under this provision of the constitution, was held not to possess the power of eminent domain. In *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914, there was an attempt by a plaintiff to recover possession of, and quiet title to, certain real estate which he had conveyed to the defendant, an alien. After a somewhat critical and extended review of the authorities touching the right of the plaintiff to avoid his deed upon this ground, Justice Crow, speaking for the court, said:

"Under our constitution and the authorities above cited, we hold the rule in this state to be that the deed of the appellant *Abrams* entirely divested him of any title to the real estate; that he is in no position to question its validity; that his alien grantee took what was known at common law as a defeasible estate, void as against the state only, and which might escheat to the state upon office found."

In that decision, and also in *State ex rel. Atkinson v. World Real Estate Commercial Co.*, 46 Wash. 104, 89 Pac.

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471, it was held that even the right of the state to interfere because of such ownership ceased to exist when a citizen successor to such alien owner acquired the property by inheritance or conveyance from such alien owner. This holding also finds support in the earlier cases of *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, and *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 762. We are of the opinion that appellants are in no position to resist, upon the constitutional ground urged, the claim of respondent to the property; because the state alone can complain upon that ground, and, because the interest in the property sought to be enforced is now in respondent, who is concededly a citizen of the United States.

While we conclude that the failure to tender interest with the tender of \$500 for the final installment of rent did not render that tender ineffectual in saving respondent's rights as lessee, nevertheless, appellants are now entitled to be paid \$12 for such interest out of the money deposited by respondent in court for the use of appellants. We direct that the judgment be corrected accordingly.

Subject to this correction, the judgment is affirmed. Respondent will recover costs in this court.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11949. Department Two. August 11, 1914.]

WILLIAM TOPPING, *by his Guardian etc., Respondent*, v.
GREAT NORTHERN RAILWAY COMPANY, *Appellant*.¹

CARRIERS—INJURIES TO PASSENGERS—CAUSE OF ACCIDENT—ACT OF GOD—CONCURRING NEGLIGENCE—BURDEN OF PROOF. There is not such a presumption of negligence on the part of a railway company merely from the occurrence of an accident as to render it liable for the death of a passenger on the ground of *res ipsa loquitur*, but the accident was the result of an act of God, placing the burden on plaintiff to show negligence concurring therewith before recovery could be had, where it appears that a passenger train stalled in the mountains was placed on a passing track on a hillside during an unusually severe snowstorm, while efforts were being made to open the track, and that while so located, an avalanche of snow swept down the mountain-side and carried the train one hundred feet from the track, where it was destroyed, killing and injuring the passengers, it further appearing that the hillside above the train sloped at an angle of 30 degrees, and at the time of the accident was covered with from nine to twelve feet of snow, that slides had never occurred before at the place in question, but were known to have occurred along the mountain-side, usually in gullies, and that the railroad had been operated at that place for a period of seventeen years.

SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such a case, the railroad company is not shown to be guilty of negligence concurring with the act of God in causing the accident from the fact that it adopted the location on the hillside for its roadbed, in failing to construct a snowshed over the passing track or to move the train under snowsheds near the place of the accident, in failing to move the train into a tunnel near at hand or to a spur opposite a flat area, in failing to notify the passengers that it did not intend to, or could not, move the train from the mountain-side to a safe place, in taking the train from the tunnel, where it was safe, and in leaving it on the mountain-side where there was a heavy body of snow, where it appears that the road had been located and operated at the place of the accident for seventeen years, that no slide had ever occurred there before, that the train was placed on the passing track for the convenience of the passengers, who remained on the train during the blockade and boarded at a hotel nearby, and because it was considered a safe place; that the failure to notify the passengers that the officers did not intend to move the train, or in

¹Reported in 142 Pac. 425.

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falling to notify them that it could not move the train to a safer place, was because the officers did not know when the train could be moved; that the company was using every effort to raise the blockade and to provide for the safety and comfort of the train and passengers; that no one could anticipate that a slide would occur; and that the officers of the train exercised their best judgment in placing the train where it was at the time of the accident.

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 15, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the wrongful death of a passenger on a railroad train. Reversed.

F. V. Brown and F. G. Dorety, for appellant.

Fred M. Williams and L. F. Chester, for respondent.

MOUNT, J.—This action was brought by the plaintiff through his guardian *ad litem* to recover damages on account of the death of his father. The father, Edward W. Topping, was a young man thirty years of age. He was killed while a passenger on one of the trains of the Great Northern Railway Company which was wrecked by an avalanche at Wellington, in this state, on March 1, 1910.

The cause of action was based upon the following paragraph of the amended complaint:

"That on to wit the 1st day of March 1910, Edward W. Topping was a passenger for hire on one of defendant's trains, between the cities of Spokane, Washington, and Seattle, Washington, and en route to the latter and while such passenger, said train was, on said last named date, through the negligence and carelessness of defendant, derailed and wrecked at or near the station called Wellington, on said road, the exact nature and extent of said acts of negligence on the part of defendant not being fully known to plaintiff, but well known and understood by defendant, and the said Edward W. Topping was then and there killed in and by said wreck and derailment of said train."

The answer of the defendant was a general denial and an affirmative defense of *vis major*, or act of God. The

cause was tried to the court with a jury. At the close of the plaintiff's evidence, a motion for nonsuit was denied. At the close of all the evidence, a motion for a directed verdict was also denied. After the cause was submitted to the jury, a verdict was returned in favor of the plaintiff for \$20,000. This appeal followed.

Numerous errors are assigned. But we are satisfied that the motion for nonsuit and motion for a directed verdict should have been sustained by the trial court, and for that reason we shall notice only these assignments.

The following facts are practically undisputed: Edward W. Topping took passage from Spokane on the defendant's train bound for Seattle, on the evening of February 22, 1910. This train was a regular passenger train running from Spokane to Seattle across the Cascade mountains. The distance between Seattle and Spokane is about 375 miles. The running time was about 12 hours. This train did not carry a dining car, but carried sleeping cars. It is conceded that Mr. Topping was a passenger for hire on this train. At the time the train left Spokane, there was known to be a storm in the Cascade mountains which had been raging for a period of one or two days. But at that time trains were running regularly on about schedule time. This train was No. 25, and will hereafter be referred to by that number.

In the Cascade mountains, is a tunnel about three miles long through the summit. The station at the east portal is known as the "Cascade tunnel." The station at the western end of this tunnel is known as Wellington, at which place there is a hotel and a few other buildings located on the mountain-side near the railway. Train No. 25 reached Cascade tunnel at the eastern end of the tunnel at about 5:30 in the morning of February 23d. At that time the storm had not abated in the mountains and the line at points between Wellington and Seattle was blocked with snow. Train No. 25 remained at Cascade tunnel until the evening of Feb-

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ruary 24th, when it was taken through the tunnel and placed on a passing track at Wellington, where it remained until February 28th, or the morning of March 1st at about 1:30 o'clock, when an avalanche of snow swept down the mountain-side and carried this train with it a distance of about 100 feet below the track, where the train was destroyed. Edward W. Topping and other passengers were killed. Others were injured.

When train No. 25 arrived at Cascade tunnel on the morning of February 23d, there was a heavy snowstorm. Snow had been falling about 24 hours. It had been falling at the rate of about three feet per day. Some of the witnesses testified that, when the train went through the tunnel to Wellington, the snow there was between eight and nine feet deep. It was not shown or claimed that this was all fresh snow. A part thereof had accumulated during the winter.

The railroad track at Wellington was built upon the mountain-side. The railway tracks at this place consisted of a main line, two or three switches, and what is known as a "passing track." The passing track connected with the main line at each end. During the time train No. 25 stood upon this passing track, the railroad between Wellington and Seattle was blocked with snow and slides, so that trains could not run through. The track was also blocked with snow and slides from the Cascade tunnel east toward Spokane. From the time train No. 25 was placed on the passing track at Wellington on the 24th of February until the 1st of March, every effort was being made by the railroad company to open the track so that trains could be run through. On the night of the 28th, or the morning of March 1st, an avalanche of snow broke upon the hillside to the north of the train, and slid down, carrying the train with it. This avalanche broke off four or five hundred feet above the track, and extended from 1,500 feet to 2,000 feet along the track. At that time, there was an unusual storm raging: wind, thunder, lightning, and excessive snow. It was an unprecedented storm. The

avalanche came without warning and swept the train down the hillside.

Part of the time while the train was at Wellington it stood in the mouth of the tunnel, which is but a short distance away. It was then moved down a little west of the town of Wellington, where it was when finally swept away. To the west of Wellington, there were snowsheds. A little further on was what was testified to by some of the witnesses as a flat place. The hillside above the train extended up at an angle of about 30 degrees. The snow upon the hillside at the time of the disaster was from nine to twelve feet deep. The railroad had been operated in this place for a period of seventeen years. The storm was an unprecedented one, both in length of duration and in its violence. Snow slides had been known to occur along the mountain-sides during the winter seasons during heavy storms. These slides usually occurred in gulleys. A slide had never been known to occur at the place where the train was standing on the siding. A little west of this, some five or six hundred feet, a slide had occurred some years previous, but at a point where there was a gully.

It is apparently conceded, or at any rate it was shown by the plaintiff, that the primary cause of the accident was the snowslide which came down the mountain-side and swept the train to disaster. It is plain, from the evidence in the case and from the undisputed facts, that this avalanche was what is known in law as *vis major* or an act of God, which, unless some intervening negligence of the railway company is shown to have cooperated with it, was the sole cause of the accident, and for which the railway company is not liable. As we have seen, the complaint alleged that the train was wrecked through the negligence of the appellant, the nature of which negligence was unknown to the respondent. No specific act of negligence is alleged. The respondent contends that there is a conflict of authority upon the question whether it is the duty of the defendant to show affirmatively that there was no negligence or want of due care on its part

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when the defense is an act of God; and argues that the weight of authority supports the rule that it is incumbent upon the carrier to show that due diligence was used, in order to avoid injury or loss. If there is a conflict in the authorities upon this question, we are satisfied the better rule is, in cases such as the one before us, where the respondent alleges negligence and shows that an act of God was the primary cause of the injury, he is required to show negligence of the appellant concurring with the act of God before there can be a recovery. We think that rule has been adopted in this state. If the accident is of such a character as to raise a presumption of negligence, from the occurrence of the accident itself, then, no doubt, negligence will be presumed, under the rule *res ipsa loquitur*; but if the circumstances surrounding the accident are not such as will raise a presumption of negligence, then it is necessary to prove negligence. This rule has been laid down by this court in *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838; *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912 D. 433; *Wile v. Northern Pac. R. Co.*, 72 Wash. 82, 129 Pac. 889; and *Johnson v. Columbia & Puget Sound R. Co.*, 74 Wash. 417, 133 Pac. 604. The rule, *res ipsa loquitur*, cannot apply in this case, because here, as we have seen above, the circumstances surrounding the accident were not such as to raise a presumption of negligence. The avalanche was the primary cause of the accident, and the mere fact that the avalanche slid down the mountain-side and destroyed the train would not of itself raise a presumption of negligence on the part of the appellant. It was therefore necessary to prove negligence; and we think the respondent, when the complaint was filed, appreciated this rule, because negligence was alleged.

In *Cormack v. New York, N. H. & H. R. Co.*, 24 L. R. A. (N. S.) 1209, in a note to that case, it is said:

"All the authorities are agreed upon the proposition that an unusually heavy snowstorm which ties up railroad operations to such an extent as to obstruct the movements of

trains is an act of God which will relieve a common carrier from liability for loss of goods or for injuries to passengers caused thereby. [Citing authorities.]

"Upon the same principle, it was held in *Denver & R. G. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518, that a snowslide in a mountain, which struck and derailed a train at a point on the railroad where a slide had never before been known, and where there was no reason to anticipate one, was an inevitable accident, and that the carrier would not be liable for injuries to a passenger, caused thereby."

In *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 Mo. App. 554, the court said:

"The burden lay upon her to show that, notwithstanding the operation of the act of God in the case, the negligence of the defendant caused the injury, or actively cooperated with the act of God to produce it. Even if it could be stated without qualification, which it cannot, that, in an action against a carrier by a passenger, mere proof of the accident and injury shifts the burden, that rule would not apply to a case where the plaintiff's own evidence shows the act of God as an operating and possibly sufficient cause. See *Railroad Co. v. Reeves*, 10 Wall. 190; *Livesey v. Philadelphia*, 64 Pa. St. 106; *Le Barron v. Ferry Co.*, 11 Allen 316; Whart. on Neg., sects. 129, 661."

And further along in that case it was said:

"It has been truly said there is hardly any act of God, in the legal sense, which an exhaustive circumspection might not anticipate, and supposable diligence not avert the consequences of. So that this doctrine would end in making the carrier responsible for the act of God, when by law the passenger, and not the carrier, takes this risk. It has been seen that to make the rule a working rule, and give to the carrier the practical benefit of the exemption which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person or company in the same business would use under all the circumstances of the case. [Citing authorities.]"

To the same effect see *Jones v. Minneapolis & St. L. R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507. And in *Wolf*

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v. American Express Co., 97 Am. Dec. 406, in note at page 411, it is said:

"If it appears from the plaintiff's own evidence that the act of God caused the injury to the goods, the carrier is exonerated from liability, unless the plaintiff shows that the carrier was guilty of some specific negligence which actually co-operated to produce the loss."

And in *Galveston, H. & S. A. R. Co. v. Crier*, 45 Tex. Civ. App. 434, 100 S. W. 1177, the court said:

"If, then, it be shown by the evidence that a cyclone was the cause of the wreck, the presumption of negligence, which ordinarily obtains from the fact of a derailment, does not arise in this case. For the very evidence that shows the derailment proves its cause to be one that could not be anticipated and provided against, and this would cast the burden of proving the defendant's negligence upon the plaintiff. [Citing a number of cases.]"

We are satisfied that this is the correct and reasonable rule. It was the duty of the respondent, therefore, to prove negligence on the part of the appellant. This we are satisfied was not done.

The respondent argues at length that the appellant company was negligent, and that such negligence cooperated with the act of God to cause the accident. This argument is summarized in the respondent's brief as follows:

"(1) In adopting the shelf along the mountain-side for its road-bed and laying its tracks there.

"(2) In failing to construct a snowshed over the passing tracks knowing the passing track would be used for holding trains taken off the main line and knowing the liability to snowslides along that portion of the road from Wellington to Alvin.

"(3) In taking the train from Cascade Tunnel, where it was safe from snowslides, and placing it upon the passing tracks on the mountain side that arose precipitously above and descended precipitously below it at a time when that mountain-side was carrying a heavy body of snow.

"(4) In leaving the train on that mountain-side during the four days and nights intervening between the time of placing it there, and the time of the snowslide in question.

"(5) In failing to move the train under the snowsheds on the 25th or 26th of February, when the defendant had the tracks to snowshed 3.3 clear and admittedly had the means with which to move the trains to the snowsheds.

"(6) In failing to move the train from the mountain-side back to the spurs opposite the flat area between the station and the tunnel while it admittedly had the power to do so.

"(7) In failing to move the train from the mountain-side into the tunnel, where it would have had absolute safety from the impending danger while it admittedly had the power to do so.

"(8) In failing to notify the passengers of train 25 on or before the night of the 26th of February that it did not intend to move the train from the mountain-side.

"(9) In failing to notify them thereafter that it would not or that it then claimed it could not move the train to a safer place instead of leading them to believe the train might start on its destination at any time."

These are all of the specified acts of negligence argued by the respondent. It is apparent that none of these are negligent acts. If it was a negligent act for the railway company to construct its road along the mountain-side, then it was negligence to construct its line or run its trains across the mountains. It is common knowledge that railroads cannot be constructed across the Cascade mountains without building tracks upon the mountain-sides. Nor was it negligence to fail to construct snowsheds over the passing track. While it was known that this track was for the purpose of holding trains when taken off the main line, it is not shown, nor is it a fact, that any other slide had occurred at this particular point. In fact, the undisputed evidence is that no slide had ever occurred at this point previously. The road had been operated and maintained for a period of seventeen years at this place, and no slide had ever occurred at this place. There was no negligence, therefore, in failing to

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anticipate a slide or an unusual storm or an unusual occurrence.

It is argued, also, that taking the train from the tunnel and leaving it upon the mountain-side for four days, failing to move it under a snowshed some distance away, failing to place the train upon what was known as a flat area between the station and the tunnel, failing to move it from the mountain-side into the tunnel, were acts of negligence. When viewed in the light of what happened afterwards, it is no doubt true that the accident would not have happened if the train had been at some other place. But at the time the train was placed on the passing track, where it was when finally destroyed, it was placed there by reason of the fact that this was considered the most convenient place for the passengers who remained on the train and who boarded at the hotel in the town of Wellington within four or five hundred feet from where the train was stationed, and because this was apparently a safe place. No one at that time anticipated, nor at any other time could anticipate, that a snowslide was about to occur at that place. It certainly cannot be held that the officers in charge of the train were required to know in advance that the storm which was then raging would continue for an unprecedented length of time, or that an avalanche of snow would come down the mountain-side at that place where a slide never had occurred when the snow had been much deeper. They certainly, in the exercise of their judgment and experience, were authorized to place the train where past experience had shown it would be safest and most convenient. There is no evidence to show that they did not exercise this judgment and place the train where, in their opinion, it was safest. It cannot be assumed, therefore, nor said, that the officers were negligent in placing the train where it was placed. In *Galveston, H. & S. A. R. Co. v. Crier, supra*, the court of civil appeals of Texas said upon this question, where the derailment of a train was caused by a cyclone:

"Nor is there anything which tended to show that defendant's engineer and conductor were guilty of negligence in failing to stop the train before encountering the whirlwind. Had they known or had reason to believe it was impending, they had no more reason to believe that it would strike the railroad where it did than at any place along its road where the train might have been stopped. Defendant's servants operating the train might as well be charged with knowledge of where a thunderbolt would strike and be imposed with the duty of avoiding it, as to charge them with knowledge of when and where a whirlwind would arise, and the course it would take."

And the same is true in this case. The officers in charge of this train were no more bound to place the train upon a flat or in a tunnel, or under a snowshed, than they were to know that an avalanche was sure to come, or to know the exact spot where the avalanche would start, the course it would take, or its extent. These things are clearly beyond the knowledge of men. And of course the railway company cannot be said to be guilty of negligence in failing to know them. It was not known that a snowslide would occur. While the snow was deep, it was no deeper than it had been on previous occasions, when no slide had occurred at this place. As tending to show that every one there regarded the train as the safest place, it was shown, without dispute, that the passengers and railway employees and officials present slept upon this and other trains there in preference to sleeping in the hotel, which could have accommodated them, and which furnished them their meals.

Nor was there any negligence in failing to notify the passengers that the officers did not intend to move the train from the mountain-side, or in failing to notify them that it could not move the train to a safer place instead of leaving them to believe that the train might start on its destination at any time. These two propositions were not negligence for reasons hereinbefore stated, and for the further reason that the

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officers themselves did not know when the train could be moved. They and every one there knew that the train was completely blocked and could not then be moved. And it was not shown that these officers, or any other person in that vicinity or elsewhere, then knew that a slide would occur or suspected that this place was not as safe as any other place in that vicinity. The belief was that this was the safest place, and this belief was justified by past experience and under all the then existing conditions. The evidence shows, without dispute, that the railway company was using every energy, almost superhuman efforts, to raise the blockade which caused the train to be at that place, and were suspecting that the train might start on its way to its destination at any hour, until the train was finally swept away. Every possible human effort was being exercised by the railway company with men and snow plows to raise the blockade which then existed upon that part of the appellant's railway line. Viewing the case from every angle, it is plain that this avalanche was what is known in law as an act of God; that no negligence on the part of the appellant or its employees was shown in any particular; that every effort was being made by the railway company for the comfort and safety of its train and the passengers aboard it; that they had operated this road for a period of seventeen years without an avalanche or snow slide at this particular place; that this was an exceptionally severe storm; that it lasted for an exceptionally long time; and that, before that time, no accident of this kind had ever occurred upon its line in this state. It is too plain for argument that no negligence of the appellant was shown, but that the slide, which was the proximate cause of the accident, was a cause over which the railway company had no control, which it did not and could not foresee or know of until after it occurred, and for which it is not responsible. It was the duty of the trial court, therefore, to have granted a nonsuit, or to have instructed the jury to return a verdict in favor of the appellant.

The judgment is therefore reversed, and the cause ordered dismissed.

CROW, C. J., PARKER, and MORRIS, JJ., concur.

[No. 12002. Department One. August 12, 1914.]

STANLEY T. SCOTT *et al.*, *Appellants*, v. THE CITY OF
TACOMA, *Respondent*.¹

MUNICIPAL CORPORATIONS — INDEBTEDNESS — BONDS — DIVERTING FUNDS—VALIDITY. Where a city, in providing for the construction of a municipally owned street railway, to be equipped and operated by an existing railway company on a percentage basis, adopted, by ordinance, a plan to transfer to the special railway fund receipts of the city from percentages paid by street railway corporations as franchise taxes, in case the gross revenues from the operation of the street railway were not sufficient to pay principal or interest on bonds and warrants when due, and limiting the liability of the city to the special fund, the sums so loaned to be repaid out of the gross revenues of the street railway as the same shall accrue, the transfer of a portion of the franchise tax is not the incurring of a municipal indebtedness in violation of the constitutional limitation, but a loan to the special fund under control of the city and which fund has an assured income.

SAME—POWER TO TRANSFER FUNDS—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8008, authorizing the common council to create a special fund to defray the cost of a public utility, into which fund the city may be obligated to pay a proportion of the revenues of the city, and to issue interest bearing bonds or warrants payable only out of such special fund, does not limit the fund to receipts from the utility to be created.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 18, 1914, in favor of the defendant upon the pleadings, in an action for an injunction. Affirmed.

¹Reported in 142 Pac. 467.

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C. M. Riddell and Hayden, Langhorne & Metzger, for appellants.

T. L. Stiles and Frank M. Carnahan, for respondent.

The Attorney General and L. L. Thompson, Assistant, amici curiae.

Gose, J.—This is an action by taxpayers to enjoin the issuance of certain municipal bonds. There was a judgment in favor of the defendant on the pleadings. The plaintiffs have appealed.

The essential facts disclosed by the pleadings are these: The city of Tacoma, in pursuance of a power conferred by the public utilities act (Rem. & Bal. Code, § 8005 *et seq.*; P. C. 77 § 1073) in April, 1913, passed an ordinance providing for the construction, equipment and operation of a municipally owned street railway on South Eleventh street between Pacific avenue and the easterly limits of the city. At an election called for that purpose, the ordinance was approved by the majority of the electors voting thereat. Thereafter the city council adopted Ordinance No. 5,713, providing for the creation of the Tacoma street railway fund No. 1, and for the issuance of bonds and warrants thereon in the sum of \$35,000, with which to construct such street railway line; and authorizing the sale or other disposition of the bonds or warrants. Sections 2 and 3 of the ordinance are as follows:

“Section 2. Beginning with the operation of said street railway and thereafter while any of the obligations hereinafter mentioned are outstanding and unpaid, the city treasurer shall set aside and pay into said Tacoma Street Railway Fund No. 1, the gross revenues derived from the operation of said street railway, or so much thereof as shall be necessary to pay the principal of the outstanding obligations hereinafter mentioned and the semi-annual interest thereon in seven years from August 1, 1914, as hereinafter provided. All the moneys so set aside and placed in said fund shall be applied solely to the payment of the obligations issued against the

same, with interest thereon, and the city of Tacoma hereby irrevocably binds itself not to sell said street railway until the said obligations, with the interest thereon, shall be fully paid; or, in case it shall sell said street railway before such payment, it binds itself to pay all of said obligations and interest thereon out of any moneys derived from such sale, and that in any event it will not sell said street railway for a sum less than enough to pay said obligations and interest.

"Section 3. Should the gross revenues from the operation of said street railway not be sufficient to pay the principal or interest upon any of said obligations when the same, or either of them, become due and payable, there shall be transferred into and loaned to said fund, out of the moneys received by the city of Tacoma from percentages paid by street railway corporations as franchise taxes, such sum or sums as may be necessary to make up the deficiency; which sums so loaned shall be repaid out of the gross revenues of said street railway as the same shall accrue." Tacoma Ordinance, No. 5,713.

Section 6 of the ordinance limits the liability of the city to the special fund. It is conceded that the city of Tacoma is indebted in a sum in excess of one and one-half per cent of the assessed value of the property therein subject to assessment, according to the last assessment roll for municipal purposes. It is also conceded that the electors have not authorized the construction of a street railway upon credit. The city has entered into an agreement with the Tacoma Railway and Power Company, which owns and operates all the present street railway lines in the city, whereby that company agrees to equip the proposed railway and operate it with full transfer privileges, and pay to the city four per cent on the cost of the line and one-half of the net earnings. The agreement runs for seven and one-half years. The income from the system during the life of the contract will more than pay the interest on the bonds. The pleadings allege that, at the expiration of the agreement, there is every reason to believe that it can be extended if the city desires. Upon the basis of the agreement, the bonds would be retired within twenty-four years.

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It is contended that the proposed transfer of a portion of the franchise tax will create a debt, the argument being that a transfer of the franchise tax will necessitate the levying of a general tax to meet the sum withdrawn. Under the terms of its franchise, the Tacoma Railway and Power Company pays to the city five per cent of its gross freight earnings and two per cent of its gross passenger earnings, aggregating more than \$20,000 a year, and it is a portion of these revenues that the city proposes to loan to the street railway fund.

We think the case is controlled by *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107. In that case, the city was enlarging and extending its water system in pursuance of an ordinance authorizing it so to do. The ordinance created a special fund by setting aside at least fifty per cent of the gross revenues of the water system, and provided that all moneys so set aside and placed in such special fund should be applied solely to the expenses of enlarging the system. On the same day, the city passed another ordinance by the terms of which it transferred from the general fund of the city to the special fund the sum of \$100,000, as a temporary loan from the general fund to the special fund. The income from the water system was about \$20,000 a month. In holding that the proposed plan did not create a debt, the court said:

"It is next suggested that the proposed pledging of the water receipts and the transfer from the general to the special fund, will obligate the city for new indebtedness which it cannot incur by reason of the constitutional limitation upon that subject. This court has already held that the mere pledge of the water receipts as a special fund does not create a debt against the municipality within the meaning of the constitutional inhibition. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895. We have also seen from what has already been said that the transfer from one fund to the other creates no indebtedness against the city. It is a mere temporary loan to a fund, with an as-

sured income, whose sources of supply are entirely under the control of the city. The city's general funds are not thereby in fact reduced, inasmuch as the credit of the general fund for the temporary transfer is the equivalent of cash as a working asset, and no new debt of the city arises."

The appellants seek to distinguish the *Griffin* case upon the ground that, in that case, the special fund had an assured and certain income from an existing plant; whilst in this case, the railway is not yet constructed, and it is argued that the income of the system is uncertain. The point actually decided in the *Griffin* case was that the transfer from one fund to another fund with an assured income was in the nature of a loan and created no indebtedness against the city.

The *Attorney General* has filed a brief as *amicus curiae*, in which he questions the soundness of the distinction which the appellants seek to make, saying that, in the *Griffin* case, the city had complete control of the fund to which the loan was made, the same as in the present case. He seeks to distinguish the case at bar from the *Griffin* case on the ground that, in the *Griffin* case, the loan to the special fund was made by virtue of a separate ordinance which was not incorporated in the contract made with the bondholders, while in the case at bar, the same thing was accomplished by a single ordinance, pledging a portion of the franchise taxes. We are not impressed with this attempted distinction. The same thing was accomplished in both cases. In the *Griffin* case, the city loaned \$100,000 from the general fund to the special fund, the latter fund being pledged to its repayment. In this case, the city pledges not to exceed fifty per cent of the revenue derived from the franchise taxes to the special fund, and obligates the special fund to return it. In this case, as in the *Griffin* case, the special fund is under the control of the city and has an assured income. If the loan did not constitute a debt in the *Griffin* case, the pledge of the franchise tax does not constitute a debt in the case at bar.

Cases have been cited from other jurisdictions which hold

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that a pledge of existing property or its revenue to acquire a new public utility creates a debt. The contrary was held in the *Griffin* case. Other cases are cited which hold that the laying of a tax running through a series of years for a like purpose is the creation of a debt. That question is not before us. We are not called upon to decide whether the special fund theory is extended beyond its logical limits in the *Griffin* case. The rule which it announces has, no doubt, been followed by many municipalities in the state in acquiring or extending public utilities. This being true, the doctrine of *stare decisis* should obtain. We think the proposed plan falls within the principle announced in the *Griffin* case.

The *Attorney General* suggests that the special fund authorized under the public utilities act (Rem. & Bal. Code, § 8008; P. C. 77 § 1078) is limited to the receipts from the utility to be created, and that the city has no authority to use any other money for that purpose. We do not so read the statute. It gives the common council the power to create a special fund for the sole purpose of defraying the cost of the public utility "into which special fund" the common council may obligate the city to pay a fixed proportion of the gross revenues of the utility and to issue and sell interest-bearing bonds or warrants payable *only* out of such special fund. We do not read this language as limiting the fund to the revenues of the utility.

The judgment is affirmed.

CROW, C. J., ELLIS, and MAIN, JJ., concur.

CHADWICK, J. (dissenting).—The decision of the lower court and the opinion of the majority can be sustained only by reference to the case of *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107. That case is wrong, as I believe the majority of the court would be willing to admit if the question were now presented for the first time. It is wrong for the reason that it permits the constitution to be overridden by a resort to bookkeeping methods. Too many cases have been decided by

this and other courts justifying municipal corporations, which, through necessity or design, have violated the plain provisions of the constitution limiting indebtedness. The result has been untold confusion. Almost every contemplated municipal activity is brought to this court in some preliminary way by friendly suit, and no man knows whether a municipal obligation is valid or invalid until this court has pronounced a final judgment. The majority of my associates are unwilling to overrule the *Griffin* case, believing that it would tend to invalidate possibly millions of dollars in securities and obligations issued by our municipal corporations since the rule was announced. This may well be doubted. If this case involved no more than a rule of practice, the position of the court would be well taken. The situation is more serious. It depends upon an authority no less than the constitution itself. The people have undertaken to fix the limit of municipal indebtedness and it seems to me that, when it has become apparent to the court that to further extend the doctrine to meet seeming necessities or new municipal activities, we are inviting a greater and more hopeless confusion. Instead of finding a way around the constitution in such cases, the better way would be to amend or repeal the constitution; for, if the present practices are to continue, it seems to me that the constitutional limitations upon indebtedness will become, if indeed they have not already become, dead letters.

The exceptions that have been made by municipal corporations under the sanction of the courts are not found in the constitution except by forced construction. Until we get back to the provisions of that document fixing limitations upon indebtedness, we can expect no settled law, and this court will be even more constantly called upon to act as ministerial advisers of city councils. We will be required to pass upon their bookkeeping methods and to say what is lawful or necessary and what is not lawful or necessary, as well as what is a solvent fund and what is not a solvent fund. In the *Griffin* case, the court made solvency the test, whereas, the people

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in plain words, Art. 8, § 6, Constitution of Washington, had made a percentage of assessed valuation—the amount of indebtedness without reference to solvency—the test. The reasoning of the court in the *Griffin* case finds a parallel in this: "A" owns property which he believes to be worth \$10,000. He borrows \$5,000. Upon present estimates, he is solvent, *ergo*, he is not in debt. There would be great comfort in this reasoning if the thing we have decided is no debt could not be converted into a reality by the demand of a creditor. The effect of this decision will be to bring hundreds of purely municipal questions to this court, for no city attorney can advise, and no bond buyer feel secure, until we have said whether a contemplated indebtedness falls within the constitution or out of it, and whether the particular fund out of which the loan is to be made is solvent, for as was said by Judge Rudkin, Judge Fullerton concurring, in his dissent:

"The security may be good in this case, but it may be bad in the next, and the existence of the power cannot depend on the wisdom or folly that may accompany its exercise."

There could be no possible judicial question if we had insisted upon the observance of the constitution until it could be altered or amended in a regular way. The right of a municipality would depend upon a simple mathematical calculation. We have already come to the point where it is the law that a writing tablet is a necessity and a waste basket is not; that a borrowing from a fund with a theoretically *assured* income is no violation of the constitution, and by the same token a borrowing from a fund of *doubtful* income is. We have allowed ourselves to be led into a maze of nonjudicial questions. There is only one remedy, and that is to recur to fundamental principles. The present burden of public indebtedness is such as to call for an application of the limitations of the constitution as they are written. It may work a present hardship, but the remedy is not with the courts; it is in the people's own hand. If the constitutional limit is too low, it can be increased by amendment; or if the people

want to repeal the constitutional limitations upon public indebtedness, they can accomplish it without resort to the courts.

I have not cited or reviewed the numerous cases sustaining the methods employed in evading the constitution. They are known to every lawyer who is at all familiar with our decisions. I believe the *Griffin* case should be overruled, and therefore dissent from the opinion of my associates.

[No. 12181. Department Two. August 12, 1914.]

THE STATE OF WASHINGTON, *on the Relation of George W.
McCauley, Plaintiff, v. MITCHELL GILLIAM et al.,
Respondents.*¹

OFFICERS—RECALL—PETITION — REQUISITES — FILING STATEMENT—SUFFICIENCY. A statement filed by the proponents of a recall containing merely an itemized statement of receipts and expenditures, with the post office address of the contributors and of those to whom the money was distributed, is not a compliance with 3 Rem. & Bal. Code, § 4940-8, requiring, in addition to the information shown, that the statement shall contain a full, true, and detailed statement of the names and post office addresses of all persons, corporations and organizations who aided or contributed in the preparation of the charge and in the preparation, circulation and filing of the petition, with the amount contributed by each, since the law is aimed at the volunteer as well as the paid worker and requires publicity of all contributing features, and the fact that difficulty attends compliance therewith, does not invalidate the law.

Certiorari to review an order of the superior court for King county, Gilliam, J., entered July 25, 1914, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Reversed.

¹Reported in 142 Pac. 470.

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Brightman, Halverstadt & Tennunt, for plaintiff.

John F. Murphy and Samuel Morrison (Thomas A. Meade and Alfred H. Lundin, of counsel), for respondents.

MORRIS, J.—The relator commenced this action on behalf of himself and other taxpayers similarly situated, to restrain the defendant Phelps, as auditor of King county, from canvassing, counting, and checking the names on a recall petition directed against M. L. Hamilton, one of the county commissioners of King county, until those in charge of such recall petition should file a full, true, and detailed statement, giving the names and postoffice addresses of all persons, corporations, and organizations who had contributed to or aided in the preparation of the charge and in the preparation, circulation, and filing of the petition, which relator contended was the requirement of § 8, chap. 146, of the act of 1913, Laws 1913, p. 458 (3 Rem. & Bal. Code, § 4940-8). The petition alleged that the only statement filed was as follows:

“In the Matter of the Recall of M. L. Hamilton, County Commissioner, King County, Washington.

“We, the undersigned, persons submitting the above recall petition for filing in the office of the county auditor of King county, state of Washington, do hereby submit a detailed statement of the contributions of funds and their expenditures in the above matter as follows:

“Receipts.

J. A. Sloan, Seattle, Wash.....	\$2.50
N. L. Carlson, Medina, Wash.....	2.50
A. T. Rautenberg, Seattle, Wash.....	5.50
F. G. Whitaker, Seattle, Wash.....	2.50
Fred Nelson, Renton Jct., Wash.....	12.50
Herman Nelson, Renton Jct., Wash.....	12.50
Thos. A. Meade, Seattle, Wash.....	29.80
Bull Brothers, Seattle, Wash.....	5.00
Richard Mansfield White, Seattle, Wash.....	1.50
A. Havencamp, Newport, Wash.....	1.50

\$75.80

"Disbursements.

U. S. Post Office, Seattle, Stamps.....	\$.75
U. S. Post Office, Seattle, post Cards.....	1.75
Day and Night Safe Dep. & Storage Co., Seattle, Safety Dep.	1.00
O. K. Cabinet Works, Seattle, Lumber.....	1.75
Knight Sign Co., Seattle, Signs.....	10.80
Justice Stat. Co., Seattle, Supplies.....	1.00
Bull Bros., Seattle, Printing.....	55.75
Car Fare	3.00
	<hr/>
	\$75.80

"Richard Mansfield White

"Thomas A. Meade

"A. T. Rautenberg.

"Subscribed and sworn to before me this 15th day of July,
1914.

"Emerson H. Carrico,

"(E. H. C. Notarial Seal) Notary Public in and for the
"(Con. Oct. 26, 1914.) State of Washington, residing
at Seattle."

It was further alleged in the petition that there had been a large number of contributions to such recall movement not mentioned in said statement as filed, and that a large number of persons aided in the preparation and circulation of the recall petition, the name, postoffice address or identity of none of whom was disclosed by said statement. To this petition, the respondent Phelps filed a demurrer, which was sustained by the court below, and relator, declining to plead further, his petition was dismissed. Whereupon he appealed to this court and requested the lower court to fix a super-seedeas, which request was denied. Relator then sued out his writ of certiorari in this court.

The decisive question in this case is whether the statement filed by the organization seeking the recall is a sufficient compliance with the requirements of the statute. The act itself is a clear pronouncement of the legislative intent that no public official shall be subject to recall without a full dis-

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closure of identity on the part of those who take part in the preparation of the recall petition or who in any wise aid in its circulation. Section 1 (Id., § 4940-1) provides that the petition shall not only contain a concise statement of the charges signed by the parties making the same, but that such persons shall, in addition, give their respective postoffice addresses, thus providing an additional means for identification of those who become sponsors for the charges. Section 8 (Id., § 4940-8) after providing for the requisite number of signatures to be contained in any recall petition, provides that:

“At the time of submitting such petition the person, committee, or organization submitting the same shall file with the officer to whom such petition is submitted a full, true, and detailed statement, giving the names and postoffice addresses of all persons, corporations and organizations who have contributed or aided in the preparation of the charge and in the preparation, circulation and filing of the petition, with the amount contributed by each, and a full, true and detailed statement of all expenditures, giving the amounts expended, the purpose for which expended and the names and postoffice addresses of the persons and corporations to whom paid, which statement shall be verified by the affidavit of the person or some member of the committee or organization making the charge, and until such statement is filed the officer shall refuse to receive such petition.”

It needs but a glance at the statement filed by the proponents of this recall to observe that it neither complies with, nor makes any attempt to comply with, the provisions of § 8 (Id., § 4940-8). All that it purports to contain is an itemized statement of the receipts and expenditures, with the postoffice addresses of the contributors and of those to whom the money was distributed. Such a reading of the act eliminates entirely the requirement that the statement shall, in addition to the information shown in this statement, contain a full, true, and correct statement of all those persons, corporations, and organizations, with their postoffice addresses,

who have aided in the preparation, circulation, and filing of the petition. We know not by what right those who stand sponsor for this recall may file a statement showing only the financial features, and leave out the names of those persons and organizations who, without financial recompense, have contributed to the preparation of the petition or aided in its circulation. The law surely is aimed at the volunteer as well as the paid worker; at him who contributes time, energy, and information, as well as at him who contributes cash. One is as much an essential as the other, and any statement which leaves out either is defective and a noncompliance with the law. Suppose, for the sake of plainer illustration, the entire work incident to the recall movement were done by volunteers who, because of their interest in the movement, contributed their time, labor, and necessary material, so that everything was done without price. Then no financial statement could be filed and the publicity features of § 8 would be done away with. Whether or not it was for the purpose of meeting such a possible situation, the act assumes that there will be contributions in aid of the recall movement that cannot be represented in any financial statement, that are as much a part of the movement as the collection and expenditure of funds; and with the determination to require publicity of all contributing features, the law has declared that a full and detailed statement of such contributions and aids, whether in the preparation, circulation, or filing of the petition, shall be published or filed with the officer whose duty it is to receive the petition. And not only is this requirement made a mandatory duty on the part of those who are behind the recall, but the act carries its own penalty for noncompliance, in providing that, until such statement is filed, the public official shall refuse to receive the petition.

The logic of *Stirtan v. Blethen*, 79 Wash 10, 139 Pac. 618, clearly supports these views in placing the ban of the law against secret contracts entered into for the purpose of fomenting the recall of a public official, and pointing out

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that, to sustain such a contract, would put into the hands of powerful interests with unlimited means a weapon for secret intimidation and covert attack that would deter self-respecting men from accepting public office. Enlarging upon this thought, as applied to the question before us, how easy it would be for these same powerful interests to remain under cover by selecting some unknown pawn to represent them in furnishing unlimited means and employing any number of persons to perform the required services whose only interest in the movement would be represented by its financial value to them, and thus the purpose of the law in demanding full publicity of all those who have aided and contributed to the recall movement would be done away with. The only argument urged against relator's contention is that it would be impossible to comply with such a reading of the law because of the fact that many persons might be engaged in circulating the petition. Difficulty of compliance does not invalidate the law. Neither does the law require the impossible. But it does require that those who seek its aid shall conform to its conditions before they can receive its benefits. It has not been done in this case.

The judgment of the lower court is reversed, and the proceeding remanded to the lower court with instructions to grant relator the relief as prayed for in his original petition.

Crow, C. J., FULLERTON, MAIN, and MOUNT, JJ., concur.

[No. 11731. Department One. August 13, 1914.]

JOHN COSTELLO *et al.*, *Respondents*, v. ROBERT BRIDGES *et al.*,
Respondents, AND UNITED STATES FIDELITY &
GUARANTY COMPANY, *Appellant*.

UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellant*,
v. KATHRINE COCHRANE, *as Executrix etc.*,
Respondent.¹

INJUNCTION—BONDS—JUDGMENT AGAINST PRINCIPAL—LIABILITY—NOTICE AND OPPORTUNITY TO DEFEND. A bond given by a surety in an injunction suit, conditioned to pay "all damages that may be awarded against the principal in any action hereafter brought to determine the damages," contemplates an award against the principal by judgment in litigation thereafter prosecuted, and is an undertaking by the surety to abide and perform the judgment, hence the surety is bound thereby though having no notice of suit against the principal, nor opportunity to defend.

INJUNCTION — BONDS — CONDITIONS — CONSTRUCTION — DAMAGES AGAINST PRINCIPAL — "ACTION" — COMMENCEMENT — AMENDMENT OF COMPLAINT. Where plaintiffs brought an action to restrain a drainage district and its commissioners from trespassing on their lands during the construction of a drainage ditch, and the defendant filed a bond executed by a surety company conditioned that it should pay all damages that might be awarded against it in any action thereafter brought to determine the damages, and plaintiffs later, after the commissioners had proceeded with the construction of the work, filed an amended complaint in the injunction suit demanding a money judgment for damages, which was awarded them with costs, the filing of the amended complaint was the bringing of an action within the meaning of the bond, and it was not necessary to institute a new action by service of summons and complaint in order to bind the surety; since the course pursued was no material departure from that contemplated in the bond.

SAME—EXTENT OF LIABILITY—"ALL DAMAGES." In such case, liability under the bond cannot be limited to damages suffered subsequent to its execution, where it was clearly intended that the bond should cover all damages awarded resulting from the specified cause.

INDEMNITY—AGREEMENT—PERSONAL LIABILITY OF OFFICIALS. An indemnity agreement signed by commissioners of a drainage dis-

¹Reported in 142 Pac. 687.

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trict, without any mention of the drainage district or their official capacity, made as an inducement for the execution of a surety bond for the protection of landowners from damage occasioned through the construction of a drainage ditch, which recited that "we certify . . . and promise and agree to pay . . . and to keep indemnified the said company, etc." and which followed the application for the bond in which the drainage district was designated as applicant, is a personal undertaking rendering them liable over to the surety company upon judgment being rendered against it.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—OFFICIAL CAPACITY OF SIGNERS. An indemnity agreement, unambiguous on its face, showing a personal undertaking on the part of officials signing the same, cannot be varied by parol testimony to show that they intended signing in their official capacity.

Appeal from a judgment of the superior court for King county, Humphries, J., entered September 30, 1913, upon findings in favor of the plaintiff, in consolidated actions on contract, tried to the court. Affirmed in part and reversed in part.

McClure & McClure, for appellant.

Vince H. Faben, for respondents Costello *et al.*

John W. Roberts, for respondents Bridges *et al.*

ELLIS, J.—This in an action upon a bond, given by the defendants pursuant to a provision therefor in a decree rendered in the plaintiffs' favor in an action for injunction, as a condition for lifting or superseding the temporary injunction granted by that decree. Prior to April, 1905, drainage district No. 1 of King county, Washington, procured by condemnation a strip of land thirty feet wide through the plaintiffs' land as a right of way for the construction of a drainage ditch. When in April, 1905, work was begun upon the ditch, dirt and debris were thrown upon the plaintiffs' land outside of this strip. On April 14, 1905, the plaintiffs brought an action in the superior court of King county against the drainage district and its commissioners, Robert Bridges, Thomas Chapman and William Cochrane, for an

injunction restraining the defendants from going without the right of way in their operations, and from trespassing upon the plaintiffs' land. For convenience, that action will be referred to as the injunction suit. Pursuant to the necessary preliminary order, a hearing was had on April 18, 1905, and on April 22, 1905, a decree was entered restraining the defendants, until the further order of the court, from digging outside of the thirty foot strip, and providing that, before proceeding with the construction of the ditch through plaintiffs' land, the defendants should,

" . . . execute a bond with good and sufficient security in the sum of \$2,500 running to the plaintiffs, conditioned that they shall pay all damages which may grow or arise out of the construction of said ditch by reason of throwing earth, debris and other material on the lands, outside of said strip, which bond is to be filed with the clerk of this court as soon as accepted."

On April 19, 1905, evidently in anticipation of the decree, the defendants in the injunction suit filed with the clerk of the court a bond as follows:

"Know all men by these presents, that Robert Bridges, Thomas Chapman and William Cochrane, as the board of commissioners of Drainage District No. 1 of King county, Washington, defendants in the above entitled cause, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the plaintiffs in the above entitled cause and each of them, in the penal sum of twenty-five hundred dollars (\$2,500) lawful money of the United States of America to be paid to the said plaintiffs or either of them, their or either of their heirs, executors, administrators or assigns, for which payment well and truly to be made the obligors hereby bind themselves and their and each of their successors or assigns, firmly by these presents.

"Sealed with our seals and dated this 18th day of April, 1905.

"The condition of the above and foregoing bond is such that,

"Whereas the above bounden principal and defendant Drainage District No. 1 of King county, Washington, by

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“Whereas in the above entitled matter, on the 18th day of April, 1905, on the hearing on the order to show cause heretofore issued herein on the 14th day of April, 1905, the above entitled court made an order requiring the defendant to give a bond running to plaintiffs herein in the sum of twenty-five hundred dollars (\$2,500), conditioned that defendant should answer to plaintiffs for any damage which defendant might do to plaintiffs’ lands by reason of the distributing of material excavated from that part of the said ditch extending through plaintiffs’ premises, and outside of the right of way of the said drainage district,

"Robert Bridges "Thomas Chapman "William Cochrane	}	Board of Commissioners of Drainage District No. 1, King County, Washington.
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"The United States Fidelity & Guaranty Company

Thereafter, the drainage district, through its commissioners, proceeded with the work. The original complaint in the injunction suit prayed only for injunctive relief. On June 26, 1905, the plaintiffs filed in that action their amended complaint, demanding a money judgment for damages. Issues were framed and a trial was had, resulting, on May 5, 1910, in a verdict and judgment in favor of the plaintiffs Costello and wife for \$1,200 damages, caused by the defendants in distributing material on their land, and costs taxed at

\$272.10. The United States Fidelity & Guaranty Company was never made a party to the injunction suit.

In March, 1911, the plaintiffs being unable to collect their judgment, brought this action against Bridges, Chapman and Cochrane, drainage district No. 1, and United States Fidelity & Guaranty Company, setting up the foregoing facts as a breach of the bond given in the injunction suit, alleging a demand for payment upon, and a refusal of payment by, the surety company, of the amount of the judgment rendered in the injunction suit, and praying for judgment against the defendants and each of them for \$1,472.10, with interest from May 5, 1910. After the commencement of this action, William Cochrane died. Kathrine Cochrane, was appointed executrix of his estate. The plaintiffs presented their claim against his estate. It was rejected. They then filed a supplemental complaint setting up these facts in addition to those originally pleaded, and substituting the executrix as defendant in place of William Cochrane deceased. The surety company also filed with the executrix its claim for such damages, costs, expenses, attorneys' fees and other charges as it might be put to by reason of its execution of the bond in question. The claim was rejected. The surety company thereupon brought an action against the executrix. That action and the principal action of the plaintiffs herein on the bond were consolidated. The surety company demurred generally to the complaint, and also to the supplemental complaint. The demurrers were both overruled. The issues were made up and the consolidated actions were tried to the court without a jury. The court rendered judgment against the drainage district and the surety company, providing therein that, upon payment of the judgment by the surety company, it be subrogated to the plaintiffs' rights and have judgment over against the drainage district, and dismissing the consolidated actions as to the other defendants. The defendant United States Fidelity & Guaranty Company appeals.

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On the main question of liability, the appellant argues that, under its bond, the surety company was not bound by the judgment against its principal, *first*, because it was not a party to, and had no notice of, the filing of the amended complaint upon which the judgment was rendered, hence had no opportunity to defend the action for damages on its merits; *second*, because by its bond it only undertook to answer for damages to be determined in an action *thereafter* brought, and that the filing of the amended complaint was not the bringing of a new action. A *third* contention is that, if the judgment be sustained against the surety company, that company is entitled to judgment over against respondents Bridges, Chapman, and Kathrine Cochrane as executrix of the estate of William Cochrane, deceased, in their personal capacities.

I. Abstractly stated, the first question is, can a surety be bound by a judgment against his principal, which was rendered in an action to which the surety was not a party and of which he had no notice, and, if so, when? Few questions can be found presenting a greater contrariety of decision. Many cases hold that such a judgment is *res inter alios* and inadmissible as evidence against the surety; many that it is admissible, but only *prima facie* evidence, and others that, when admissible at all, it is conclusive evidence of the amount of the liability of the surety. See *Ballantine & Sons v. Fenn*, 84 Vt. 117, 78 Atl. 713, 40 L. R. A. (N. S.) 698, and the extensive note thereto. Many of the decisions are of little value as precedents because of the few facts stated and their failure to disclose the terms of the bonds involved. We shall not attempt to harmonize the cases nor mark a way through the wilderness of conflicting opinion, since it seems to us that, after all that has been said upon the subject, the only true guide in each case must be found in the language and purpose of the given obligation. As said in the note above cited:

"The wording of the instrument is everything in this class of cases. There is nothing to prevent a surety from contract-

ing to be bound by a judgment against his principal, if he choose, and if that is the fair import of his agreement, he will be concluded by such a judgment. It is simply a case of what the surety has said he will do."

See, also, *Pioneer Sav. & Loan Co. v. Bartsch*, 51 Minn. 474, 53 N. W. 764, 38 Am. St. 511. Notwithstanding the wide diversity of opinion in other respects, it may now be considered a well established principle that, when the surety, either by the express terms of his agreement or by a fair and reasonable implication from the nature and intent of his obligation, has undertaken to pay the damages and costs which may be recovered against his principal, he is, in the absence of fraud or collusion or other equitable defenses, conclusively bound by the judgment, though he had no notice of the suit against his principal. *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690. Note to *Charles v. Hoskins*, 83 Am. Dec. 380.

"Ordinarily a surety is not bound by judgment recovered against his principal when he has not been made a party to the suit or duly notified to come in and defend. But if the effect of the obligation of the surety is that he shall be bound by the result of litigation between other parties, he is, in the absence of fraud and collusion, concluded by such result." 1 Brandt, *Suretyship & Guaranty* (3d ed.), § 124.

"The condition of the bond sued on in this case is, in accordance with our statute, that 'the said Armstrong should faithfully administer said estate, account for, pay, and deliver all money and property of said estate, and perform all other things touching said administration *required by law, or the order or decree of any court having jurisdiction.*' This is the contract into which the securities have entered. There is no reason why parties should not be allowed to obligate themselves to abide by the result of a suit between others, and if the contract in this case can be fairly construed as imposing such an obligation, there is no hardship in enforcing it." *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273.

See, also, 2 Brandt, *Suretyship & Guaranty* (3d ed.), § 802; 1 Freeman, *Judgments* (4th ed.), § 180; *Riddle v.*

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Baker, 13 Cal. 295; *State v. Abbott*, 63 W. Va. 189, 61 S. E. 369; *Town of Point Pleasant v. Greenlee & Harden*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. 971; *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478; *Griswold v. Hazard*, 28 Fed. 597; *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420.

Turning to the bond here involved, we find that it is clearly conditioned to pay "all damages that may be awarded" against the principal "in any action hereafter brought to determine the damages." Beyond question, the bond contemplated an award by judgment in litigation thereafter to be prosecuted against the principal in any court having jurisdiction. A judgment against the principal was thus made a prerequisite to any right of action against the surety. Had the surety desired to litigate the issue of damages, it could have preserved that right by a mere omission of the clause above quoted. The bond was required by the court and in its purpose was somewhat analogous to a supersedeas bond on appeal. The bond itself was notice to the surety of the exact issue which the obligee must litigate with the principal in order to bind the surety. It was, in effect, an undertaking to abide and perform the judgment in such litigation. The surety did not stipulate for notice of, or for an opportunity to be heard in that litigation. By the very terms of its contract, the surety is bound by the judgment. The supreme judicial court of Maine, in a case almost the exact analogue of that here presented, has so held. A bond given as security for damages thereafter to be adjudged in future condemnation for a railroad right of way was conditioned as follows:

"Now if the said United States Construction Company shall well and truly pay to the said Will Hunt any and all land damages and costs of court adjudged by the county commissioners of Waldo county to be due said Will Hunt by reason of the construction of said railroad across the land of said Will Hunt, as aforesaid, within ninety days of said adjudication of said county commissioners, then this bond shall be void, otherwise to be in full force."

The court said:

"They [the sureties] claim, however, that they were not parties to that proceeding or judgment,—could not be heard upon *certiorari* or appeal, and hence are free to attack collaterally. But they did become parties to a written agreement with the plaintiff to guarantee to him the payment of what should be adjudged as due him from the party taking his land, the necessary and only proper party to the proceedings for such adjudication. They must have known, and hence agreed, that the proceedings to ascertain the amount due him should be against the party lawfully taking his land, or the Wiscasset and Quebec Railroad Company. They, therefore, by implication, agreed to be represented by that company in the proceedings and to abide by the judgment against it. They did not stipulate for notice to them, nor for an opportunity to question anything. They, in effect, agreed that an adjudication valid against the company should be valid against them. They cannot now, after such an adjudication has been obtained, rightfully insist upon more." *Hunt v. Card*, 94 Me. 386, 47 Atl. 921.

The appellant suggests that the *Hunt* case should be distinguished because there the surety stipulated to be bound by a judgment against a third party. It is not pointed out wherein that circumstance could make any difference either in the force of the contract or in the conclusive effect of the judgment. Of course it could make no difference.

Suppose the judgment in the original action for damages had been in favor of the drainage district. It would have been a complete bar to an action on the bond against the surety company. In any event, the judgment in that case fixes an absolute limit to the damages which can be recovered against the surety company. That was the measure of its undertaking. It would seem that, as a simple matter of correlation, where the judgment is against the principal, it should be presumptive evidence against the surety. *Stephens v. Shafer*, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793. As said in the case last cited:

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"Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts."

No such defense was offered here.

II. Was the filing of an amended complaint praying for an adjudication of the damages, the bringing of an action, within the meaning of the bond? It is obvious that, under the original complaint in the injunction suit, which set up a course of conduct on the part of the district and its commissioners likely to result in damages, and prayed only injunctive relief restraining persistence in that course, but neither pleaded facts upon which a prayer for actual damages could have been predicated nor made any such prayer, the respondents could not have maintained that suit as an action for damages without an amendment. The action was one in equity for an injunction; not one at law for damages. *Barber Asphalt Paving Co. v. Hamilton*, 80 Wash. 199, 141 Pac. 199. Up to the time the bond was given, no action (using the words of the bond) had been "brought to determine the damages, if any, done to the plaintiffs' land by the defendants." Plainly, the thing in contemplation of both parties to the bond was a future determination of the damages, if any, in any legal action thereafter taken or initiated to that end, not that a technically new action should be brought. To construe the bond otherwise, would be to relieve the bondsman on the veriest technicality, and in a way that neither party had in mind when the bond was given. Assuming, without deciding, that the amended complaint did not present a new, that is to say, an independent cause of action, in the broad sense, which, in a proper case, would permit the invocation of the statute of limitations, it did initiate the action as one to determine the damages, and, in that sense, was a new action; in fact, the first action taken for a determination of damages

by legal proceeding. Since, as we have held, the undertaking of the surety company was to abide the result of a judicial determination as against its principals in the bond in a future action, without any stipulation that it be made a party thereto or have notice of such action, it seems too plain for cavil that it could not make the slightest difference to the surety company whether that action was initiated by a new summons and complaint, seeking damages and docketed as a new action, or by an amended complaint seeking the same thing. The latter course met the only material condition of its liability, namely, an adjudication of the damages, as effectually as would the former. When regard is had to the substance of the thing rather than mere form, it is apparent that the course pursued was no material departure from that contemplated in the bond. The appellant was a compensated corporate surety. It cannot invoke the old rule of *strictissimi juris*. 32 Cyc. 306; *Pacific Bridge Co. v. United States Fidelity & Guaranty Co.*, 33 Wash. 47, 73 Pac. 772; *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; *Title Guaranty & Trust Co. v. Murphy*, 52 Wash. 190, 100 Pac. 315.

"The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance." *Young v. American Bonding Co. of Baltimore*, 228 Pa. 373, 77 Atl. 623.

"Where the instrument is fairly susceptible of two constructions, one of which would leave the obligee without remedy and the other of which would carry out the evident pur-

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pose for which the contract was required and entered into, the latter will be adopted rather than the former." 1 Brandt, *Suretyship & Guaranty* (3d ed.), p. 221, § 103.

See, also, *Atlantic Trust & Deposit Co. v. Laurinburg*, 163 Fed. 690; *Webster v. Dwelling House Ins. Co.*, 53 Ohio St. 79, 42 N. E. 546, 30 L. R. A. 719; *Philadelphia v. Fidelity & Deposit Co.*, (231 Pa. St. 208, 80 Atl. 62), Ann Cas. 1912 B. 1087, note.

The appellant also complains that a portion of the damage included in the judgment in the injunction suit was suffered prior to the giving of the bond, hence was not covered by it. We find no merit in this claim. A reading of the bond makes it clear that it was a *future award* for "all damages," not an award for *future damages* which the bond was given to secure. It was clearly intended to cover any award for all damages resulting from the specified cause. *Commonwealth v. Fidelity & Deposit Co.*, 224 Pa. 95, 73 Atl. 327, 132 Am. St. 755.

III. Are the respondents Bridges, Chapman and Katharine Cochrane, as executrix of the estate of William Cochrane, deceased, liable over to the bonding company? As an inducement to the giving of the bond, the following indemnity agreement was given:

"We certify that the answers given to the foregoing interrogatories are true, and in consideration of the United States Fidelity and Guaranty Company consenting or agreeing to execute or guarantee the bond herein applied for, we do hereby covenant, promise and agree to pay the following premium or fees agreed upon, to wit: \$12.50 per annum, and at the termination of the case, to furnish said company with satisfactory and conclusive evidence that there is no further liability on said bond, and to indemnify, and keep indemnified, the said company from and against any and all loss, cost, charges, suits, damages, counsel fees and expenses of whatever kind or nature which said company shall or may, for any cause at any time, sustain, or incur, or be put to, for, or by reason or in consequence of said company having entered into or executed said bond.

"In testimony whereof — hereunto subscribe — name and affix — seal this 18th day of April, A. D. 1905.

"Witness:	Robert Bridges	(Seal)
"J. A. Cathcart	Thos. Chapman	(Seal)
	William Cochrane	(Seal)
	"Signature of Applicant."	

While it is true, as urged by counsel, that this follows the application in which drainage district No. 1 is designated as the applicant, and the drainage district was the real principal in the bond, it does not follow that the indemnity agreement was not the personal undertaking of the persons who signed it as individuals, without any designation of their official capacity. It may be that the surety company questioned the power of the commissioners to bind the district by such an agreement, and, for that reason, insisted upon their personal undertaking. Whatever the reason, they did, in fact, execute the agreement, unambiguous on its face, personally promising and agreeing to pay the premiums and to keep indemnified the company against any and all loss, etc., in consequence of its execution of the bond. Their language is "we certify . . . and promise and agree to pay . . . and to keep indemnified the said company, etc." Every undertaking is referable to the first word "we." Nowhere in this undertaking, from certificate to promise and signature, is there any mention of the drainage district or of the official capacity of the signers. There being no ambiguity in the instrument, the court committed error in admitting parol testimony to show that the persons signing this instrument intended to sign in some other capacity than that in which they did sign. Ambiguity can no more be created by an offer to prove it than by pleading it. We said in *Toon v. McCaw*, 74 Wash. 335, 133 Pac. 469:

"Ambiguity cannot be created by pleading it. It must appear in the instrument itself. It will be observed that the defendants jointly promised to pay the note. There is nothing upon the face of the note to indicate that it was a note of the corporation only, or that it was other than the joint obliga-

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tion of all of the makers. The language of the note is 'we promise to pay.' This language is repeated in reference to the attorney's fee."

See, also, *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811. This is not a rule peculiar to negotiable instruments. It is but a phase of that general rule applicable alike to all written contracts complete and unambiguous on their face, that they cannot be varied, contradicted or enlarged by parol testimony.

"It is a universal rule that the written contract itself must be resorted to as the source of authority for receiving parol evidence, and where, as here, the contract shows a deliberate agreement complete in itself and formally executed, parol evidence to enlarge its scope or vary its terms is never admissible." *Allen v. Farmers & Merchants Bank of Wenatchee*, 76 Wash. 51, 135 Pac. 621.

The following are cases closely parallel with that here presented: *Sharp v. Smith*, 32 Ill. App. 336; *Wing v. Glick*, 56 Iowa 473, 9 N. W. 384, 41 Am. Rep. 118; *Matthews v. Jenkins*, 80 Va. 463; *Tileston v. Newell*, 13 Mass. 406; *Potts v. Henderson*, 2 Ind. 327.

The appellants are entitled to judgment over against the respondents Bridges, Chapman, and Kathrine Cochrane as executrix of the estate of William Cochrane, deceased. The cause is remanded with directions to so modify the judgment.

It appears from a motion filed in this court that, in entering the judgment in the court below, an error was made in computing interest. A form of order for correction, approved by the attorneys for all of the parties, has been submitted. This order will be transmitted with the remittitur to the trial court so that the judgment may be corrected accordingly.

CROW, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11760. Department One. August 13, 1914.]

SEATTLE, PORT ANGELES & LAKE CRESCENT RAILWAY,
Respondent, v. PAUL LAND *et al.*, *Appellants*.¹

EMINENT DOMAIN—PROCEEDINGS—REVIEW — APPEAL OR CERTIORARI. Since the questions arising on the preliminary hearing upon the questions of public use and necessity in condemnation proceedings by public service corporations are questions for the court from which there is no appeal, the method of review being by certiorari, appellants, having failed to review the preliminary order by certiorari, are foreclosed to object that there is no proof of respondent's corporate existence, that it is authorized to condemn the land, that it contemplates using the land for railroad purposes, or that it has paid its last annual corporate license.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error cannot be predicated on the exclusion of evidence, where the testimony admitted covered everything included in the offer.

EVIDENCE—OPINION EVIDENCE—REAL ESTATE VALUES—COMPETENCY. Testimony of witnesses who were experienced real estate men though not experienced in the operation of gravel pits, is admissible in condemnation proceedings affecting a gravel pit upon the general question of value and damages.

EMINENT DOMAIN—DAMAGES—VALUE OF PROPERTY—MEASURE OF DAMAGES. In condemnation proceedings for a right of way through land possessing little value except for deposits of sand and gravel thereon, the measure of damages to the land not taken is the market value as affected by the taking and not damages based on speculative profits from a gravel plant proposed to be installed at an indefinite future time.

SAME—DAMAGES TO LAND NOT TAKEN — EVIDENCE — SUFFICIENCY. In condemnation proceedings for a right of way through 40 acres of land chiefly valuable for its deposits of sand and gravel, findings of the court awarding the owners \$250 for the land taken, but no damages for the land not taken, are sustained by the evidence of witnesses placing the value of the land at from \$20 to \$50 an acre, the property condemned being 2.79 acres, that the land was only valuable for its gravel deposits, and that the construction of the railroad would be a benefit rather than a damage to the land, although appellants' witnesses estimated the damage to the remaining land at from \$3,000 to \$4,000, which was twice the amount paid for the entire tract two years previously, and no showing was made that

¹Reported in 142 Pac. 680.

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gravel land had advanced in value in that time, all of appellants' evidence of damage being based on interference with, and loss of speculative profits from, a gravel plant which the owner deemed feasible and which he intended to install at some indefinite future time.

Appeal by defendants from a judgment of the superior court for Clallam county, Ralston, J., entered July 31, 1913, awarding damages in condemnation proceedings, after a trial to the court. Affirmed.

Lyter & Folsom, for appellants.

Corwin S. Shank and *H. C. Belt*, for respondent.

ELLIS, J.—This is an appeal by the landowners from an award in condemnation. To avoid confusion, the parties will be designated throughout the condemnments as appellants and the condemner as respondent. The respondent sought to take a strip of land one hundred feet wide, containing 2.79 acres, for a railroad right of way through forty acres of land, in Clallam county, belonging to the appellants. The land was practically unimproved. Topographically, it is divided into two parts wholly unlike in character. Approximately, the east half is low bottom land cut up by overflow channels of Morse's creek. The west half, or a little more, rises in an abrupt bluff, at an angle of thirty-five degrees to forty degrees, to a height of about two hundred feet above the base of the bluff, where the right of way sought runs. The easterly low part is of little value except for use in connection with the west part, which is chiefly valuable for its gravel deposits, estimated to be about fifty feet deep on the top of the bluff, and supposed to cover the entire west part of the forty, or about twenty-five acres. The right of way enters the forty-acre tract at a point fifty or sixty feet east of the base of the bluff, extends in a southerly direction, touching, and necessitating a cut in the base of the bluff for a distance of something over two hundred feet, beginning at a point about two hundred feet from the north line of the forty-acre tract. From the cut, the

right of way runs near the base of the bluff to the south line of the tract, which it crosses at a point about one hundred and fifty feet east of the base of the bluff.

A preliminary finding of the corporate character of the respondent; that it sought the land for a public use; that the public interest required the prosecution of the enterprise, and directing that a jury be empaneled to determine the compensation, was regularly entered. On the trial of the issue of compensation and damages, a jury was waived, and the cause was tried to the court. The court awarded the appellants \$250 as compensation for the land taken, but found no damages to the balance of the land by reason of the taking. The court incorporated in the judgment, with the consent of both parties, the following provisions:

"There is reserved to the respondents [appellants here], their heirs, executors, administrators and assigns, perpetual easements, rights and privileges (a) to construct and maintain and use over said lands chutes, sluice boxes and other necessary means of conveying sand and gravel from the hill-side on the west side to the east side of the lands appropriated in this action; (b) to construct, maintain and operate such bunkers upon the westerly thirty-six (36) feet of the land appropriated in this action, as may by them be deemed needful in developing and working any sand and gravel pit or pits that may be developed and worked on land adjoining the west side of said land; (c) to construct, operate and maintain under said land such underground water pipes as may, by the respondents, their heirs, executors and assigns, be deemed needful in developing and working any such gravel pit aforesaid; provided, always, however, that the uses herein mentioned shall not interfere with the safety and practical operation of the petitioner's proposed line of railroad."

I. The first objection raised by appellants is that there is no proof that the respondent is a corporation, or that it is authorized to condemn the land, or that it in good faith contemplates building a railroad, or that it has paid its last annual corporate license.

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The proceedings for condemnation by public service corporations are clearly defined by statute and well settled in practice. Upon petition and notice, a hearing is first had upon the questions of public use and necessity. This hearing necessarily involves the corporate capacity and the right to maintain the proceedings on the part of the petitioner as a public service corporation, the purpose for which the land is sought and its necessity for that purpose. Rem. & Bal. Code, § 925 (P. C. 171 § 176). These are questions for the court. From its decision thereon there is no appeal. *Western American Co. v. St. Ann. Co.*, 22 Wash. 158, 60 Pac. 158. A review of these questions can only be obtained by *certiorari*. *North Coast R. Co. v. Gentry*, 58 Wash. 80, 107 Pac. 1059; *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892. The only question reviewable on appeal is "the propriety and justness of the amount of damages." Rem. & Bal. Code, § 931 (P. C. 171 § 180a); *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031; *State ex rel. Port Townsend Southern R. Co. v. Superior Court*, 44 Wash. 554, 87 Pac. 814. Having taken no action to review the preliminary order of the trial court by *certiorari*, the appellants here are foreclosed by the preliminary order as to all of the objections above mentioned.

II. The appellants offered to prove by the appellant Paul Land a scheme or plan for the development commercially of the sand and gravel bank located to the west of the proposed railroad. It is claimed that the court should have admitted this evidence. The offer was as follows:

"We admit that there is no sand or gravel pit there now in operation, but offer to show by this witness that this is a sand and gravel bearing property and that it contains sand and gravel of commercial quality; that it is a quarter of a mile, approximately, from tide water, and that Mr. Land has prepared and had prior to this condemnation proceedings, a comprehensive scheme and plan for the development of this property—that he intended to construct a railroad at the foot

of the hill out to tide water, and there erect bunkers and shipping facilities, and that he had arranged for a right of way through the adjoining property for that purpose."

The court said:

"You may show the difference in value between the property as it now is and as it will be when this right of way has been taken and the railroad constructed by the petitioner. Mr. Land is an experienced sand and gravel man and should know the difference between the value of the land as it now is and as it will be after the railroad is constructed, and he should be able to explain this difference. The court will permit you to show the difference in value, if any, by the taking of this strip, to the balance of the forty."

Thereafter, the court permitted the appellant Land to testify as follows:

"I have computed the damage that will be sustained by the property not taken by virtue of the construction of this proposed railroad, and estimate the damage at not less than \$4,000. . . . Prior to the time this suit was commenced, I took steps looking to the development of this particular property. I estimate the damage at four thousand dollars by the extra expense that I would be to, also the amount of gravel that I perhaps never could reach. They cut into the bank here and I could not get that out at all, except by crossing the railroad track, which would be a great big expense to me to develop that gravel property, to go across the track and put my bunkers on the east side of the track. It would be a big drawback all the way through. The proposed right of way goes so close to the foot of the hill that I would have no room for bunkers or switching facilities. I estimate it at about two and one-half million yards."

On cross-examination, he said:

"Some of this land is located about two thousand feet from tide water, some a little nearer. I would want to put two or three bunkers at the foot of the hill, maybe one hundred feet from the foot of the hill. I planned to put my bunkers perhaps two hundred feet north of my south line, somewhere near the shack. My gravel is located above the county road, and I would go under the road ten or twelve feet to get it

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out. I have not figured what it would cost to tunnel under the county road, nor have I figured the kind of bunkers, but I made tentative plans and estimated what they would cost. The receiving bunkers planned were seven hundred to eight hundred cubic yards capacity, and I figured on having two bunkers. I also figured trestling, and on getting the gravel to tide water by putting on a gas engine and running two cars out on a railroad. I figured it would be over a quarter of a mile from a point three hundred or four hundred feet north of my north line to tide water. I figured on putting in a railroad to start on the side of the hill. There is at least one per cent fall by the time I reach deep water and I could have a slight down grade all the way down. I had arranged for a right of way through Mr. Morse's place, and to pay him sixty dollars per year."

It will thus be seen that the objection raised is hardly tenable. The testimony admitted covered everything included in the offer.

III. Finally, it is claimed that the court erred in not allowing any sum as damages to the land not taken. On the question of damages, three witnesses, all experienced real estate men of Port Angeles, testified, placing the value of the land at sums ranging from \$20 to \$50 an acre, and that there would be no damage to the remainder of the land by the taking of the strip sought for a right of way. While none of these men were experienced in the operation of gravel pits, we think their evidence was admissible on the general question of value and damages. One of them had sold the west half of this land to the appellants about two years before, knowing at the time that it was being purchased for operation as a gravel pit. Two other witnesses, contractors, both of long experience in the use of gravel, though not in the operation of gravel pits, testified that they had examined this land with especial reference to the quality of gravel, and gave it as their opinion that the sand and gravel was so mixed with clay that it would be very expensive to operate as a gravel plant. They gave it as their opinion that the construction of a railroad running to Port Angeles

on the right of way sought would be a distinct benefit rather than a damage to the land as a gravel bearing property, since it would furnish transportation for the product.

The only witness who testified for the appellants as to the value of the land was the appellant Paul Land himself. He testified that the land is four miles from Port Angeles, has little or no value except for its gravel, and that the value of the whole forty is \$12,000 to \$15,000; that he bought all of the land about two years ago for \$2,000, the west half, that possessing the chief value as gravel property, for \$1,000. There was no evidence whatever to show that gravel land in particular has advanced in value during the last two years. In fact, the appellant Land testified that the dullness of the market is the reason he has not already developed this property. It is difficult to see whence comes the immense increase in value of this property from \$2,000 two years ago, the west half then having been purchased as gravel land for \$1,000, to \$12,000 or \$15,000 at the time of trial. It is only fair to the appellant to say that he was not asked, and did not pretend to say, that this figure was its market value, his evidence, taken as a whole, only implying that this was its value to him—a very different thing. Market value is always the true criterion; market value, it is true, as enhanced by the most profitable use to which the property can be put, but still market value is the only safe and just guide. Otherwise the court would be bound by any fanciful value the owner might put upon his property for use in some scheme of his own, though the scheme might be too speculative and hazardous to add any value to the land in the real estate market, even with a buyer ready and able to buy, but not compelled to buy, and a seller willing to sell, but not compelled to sell, which conditions, on all authority, fix market value. If land has a peculiar value for some determinate purpose, testimony to that effect is admissible even though it be not then used for that purpose, and there be no present intention to use it for that purpose. *Louis-*

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v. N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 South. 173. Such testimony, however, can only be considered when it is shown that the potential use may be reasonably expected to be realized in the immediate or near future.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co. v. Patterson*, 98 U. S. 403.

See, also, *Calumet River R. Co. v. Moore*, 124 Ill. 329, 15 N. E. 764. Such adaptability to some peculiar use is only admissible as affecting the present market value of the land as land. The true rule is thus expressed by a discriminating text writer:

"It is said in some cases that it is proper to consider every element of value which would be taken into consideration in a sale between private parties. But this needs some qualification, since remote and speculative reasons are often urged by the seller in support of the valuation claimed. Some cases say that the owner is entitled to the value of the property for the highest and best use to which it is adapted. This is true in so far as such adaptation affords the market value. But the proper inquiry is, not what is the value of the property for the particular use, but what is it worth in the market, in view of its adaptation for that and other uses." *Lewis, Eminent Domain* (3d ed.), pp. 1232, 1233, § 706.

The same considerations applicable to the assessment of compensation for the land actually taken apply with equal force to the assessment of damages to the remaining land, occasioned by the taking. In all such cases, the limit to the inquiry as to the possible future uses of the land as affecting value is left, to some extent, to the discretion of the trial

court. *Fales v. Inhabitants of Easthampton*, 162 Mass. 422, 38 N. E. 1129; *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56. Any other rule would, in nearly every case, compel the court to permit unlimited excursions into remote collateral and speculative issues confusing to the real question of present market value.

On the issue of damages to the remaining land, the evidence on behalf of the appellants was, as will be noted by our quotation from the testimony of Mr. Land himself, directed to showing an injury to the appellants in their business plans, looking to the construction at some future time of sluices, screens, and bunkers, the latter to be located at a point at the foot of the bluff, somewhere within the proposed right of way, or so near it as to be interfered with by the respondent's railroad, it being intended to use these facilities in connection with a railroad or tramway running to tide water, about two thousand feet distant, on the shore of the Strait of Juan de Fuca, where the appellants intended to construct a wharf for their own use. The appellants' chief witness besides Mr. Land himself testified that the respondent's railroad would be a benefit rather than an injury to the appellants' land were it not for the fact that it might interfere with the appellants' proposed plant when he desired to construct it in the future. The appellant Land testified, "I have computed the damage" and "estimate the damage at not less than \$4,000." Nowhere did he say that the basis of computation was the market value of the land or that the estimate of the amount of damage was measured by the reduced market value of his land even as first class gravel property. On the contrary, his estimate was clearly what he conceived to be its diminished value to him personally, based upon the diminished anticipated profits resulting from an estimated increased cost of production of gravel by a plan or system which he estimated would be feasible, and profitable if ever put into operation. His chief witness, using the same basis, estimated the damages to the remaining land at \$3,000 to

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\$4,000. This was not a correct basis for the estimation of damages in condemnation, in which, it is elementary, that the criterion for damages is the effect on the market value of the remaining land, not the loss of speculative profits on a business which might be conducted at some future time on the land. As said in *Providence & W. R. Co. v. Worcester*, *supra*:

"The subject of inquiry by the jury was primarily, not the value of gravel but of land. The price, the cost of hauling, and the demand and supply of an article of merchandise, which may or may not be wrought out of the land by labor which must necessarily be continued for some considerable length of time, during which the care and management of the property and the expense of holding it are uncertain but important elements in the value of the commodity when it reaches a market, cannot be said, as matter of law, to be so decisive of the value of the land as to make them in all cases competent evidence."

The damages in the large sums testified to by appellant Land and his principal witness are shown by their evidence to be based upon reduced profits, which must, of course, be dependent upon the demand and the market price of gravel for years to come. The increased cost of production which, it is claimed, would be occasioned by the construction of the respondent's road was computed by these witnesses at one cent to a cent and a half on every yard of the estimated 2,500,000 cubic yards of gravel in the entire tract. This so figured, the appellants say in their brief, would be \$2,500 to \$3,750, or approximately the damages claimed. As a matter of fact, the damages so computed would be ten times those amounts. It would be \$25,000 to \$37,500, or from two to three times the entire value of the land even at the extravagant figure stated by appellant Land.

It is, of course, absurd to say that the damage caused by the taking of a strip of one hundred feet through a forty-acre tract is several times the value of the entire tract, yet this mode of figuring is the only justification offered as the

basis of appellants' claim of any damage in any definite amount. It serves to illustrate the propriety, not to say the absolute necessity, of the rule limiting the damages to market value and reduced market value in every case. This being the only evidence of a reduced value, neither the trial court nor this court has any competent evidence of a reduced market value; hence, no evidence of a recoverable damage for injury to the remaining land. We deem it unnecessary to further review the evidence as to the damages. It was all directed to this same theory of interference with, and loss of speculative profits from, a gravel plant which the appellants expected, at some indefinite future time, to install. It was all extremely speculative, and while some of the things testified to might affect the market value of the land as land, there is absolutely no competent evidence that it would do so, or if so, to what extent.

We deem it a sound rule that damages cannot be awarded in reference solely to the particular situation, circumstances, or plans of the owner, or to the business in which he happens to be engaged, but only with reference to the uses to which the land, considered as property, may be put as affecting its present market value. *Fales v. Inhabitants of Easthampton, supra*. The reservations in the judgment met every reasonable requirement sustained by competent evidence.

The judgment is affirmed.

CROW, C. J., CHADWICK, GOSE, and MAIN, JJ., concur.

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Statement of Case.

[No. 11799. Department Two. August 13, 1914.]

CLARA MAY MILLER, *Respondent*, v. ELDRIGE R. GERRY
et al., *Appellants*.¹

FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. Findings that representations inducing the purchase of a relinquishment of a quarter section of land were fraudulent are sustained, where it appears that defendant represented that one hundred and ten acres of the land was good irrigable land, that it could be easily and cheaply irrigated and that there was a well on the land capable of furnishing water to irrigate over forty acres, when in fact it was conclusively shown that there was not that amount of irrigable land, that the land could not be irrigated from the well, and that the water was insufficient to irrigate any portion of the land, a pump installed by the plaintiff having exhausted the water in one minute and a quarter.

SAME—RELIANCE ON REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A purchaser of a relinquishment of a quarter section of land is shown to have relied upon false representations made by the owner, and not upon her own observations, as to the character of the soil or amount of water in a well, where, although she visited the land, it was at a time when the ground was frozen and covered with snow, making it impossible to determine the character of the soil or the amount of water, which was represented to be sufficient to irrigate more than forty acres of the land, thereby justifying a reliance upon the statements made.

APPEAL—REVIEW—FINDINGS. Findings of the trial court upon conflicting evidence as to the value of land at the time it was purchased, will not be disturbed on appeal.

HUSBAND AND WIFE—COMMUNITY PROPERTY—TORTS—LIABILITY OF WIFE. Where a married man made a desert entry upon land, and later sold a relinquishment the proceeds of which became community property, his acts in making the sale are those of an agent, and bind the community for a refund of the money in an action for damages for fraud in inducing the sale.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered April 16, 1913, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

¹Reported in 142 Pac. 668.

Lambert & Jeffers, for appellants.

Daniel T. Cross and *Charles K. Jenner*, for respondent.

MOUNT, J.—This action was brought to recover damages alleged to have been sustained by the plaintiff in the purchase of a relinquishment of a quarter section of land in Grant county. The plaintiff in her complaint alleged, that the purchase was made upon false and fraudulent representations made to the plaintiff by the defendant; that she relied upon such statements and purchased the land; that the statements were false, and by reason thereof she was damaged in the sum of \$2,400. The defendants denied the allegations of the complaint, and the cause was tried to the court without a jury.

After the trial, the court made findings to the effect that, in January, 1911, the defendants, for the purpose of inducing the plaintiff to purchase the right, title, and interest of the defendants to the land in question, fraudulently represented to the plaintiff that one hundred and ten acres of the land was good irrigable land; that the same could be easily and cheaply irrigated; that there was a well on the land which would furnish a sufficient quantity of water with which to irrigate over forty acres thereof; that these representations were false and made for the purpose of inducing the plaintiff to purchase the land; that the defendants, at the time the representations were made, were acquainted with the nature and character of the land and knew that the plaintiff desired to purchase the same for the purpose of irrigating the land; that the plaintiff had no knowledge of the land, or of irrigation; that she relied upon the statements made to her by the defendants, that she believed the same, and purchased the land and paid therefor the sum of \$1,500. The court also found that there was not to exceed forty acres of irrigable land upon the whole tract; that these forty acres were in irregular and detached patches; that the land could not be irrigated from the well of water thereon; that there was not

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a sufficient quantity of water to irrigate any portion of the land; that without irrigation the land had no commercial value, except for grazing purposes, and was not worth to exceed \$400. Upon these findings, the court entered a judgment in favor of the plaintiff for \$1,100, being the difference between the purchase price and the value of the land at the time. The defendants have appealed and make five contentions, which will be noticed in their order.

(1) That the agents, Stonestreet and Noyes, who brought the parties together, were the agents of the respondent and not of the appellants. It appears upon the record that the appellant Eldrige R. Gerry had made a desert entry upon the land in question. Thereafter he desired to sell his relinquishment, and asked Stonestreet to find him a purchaser. Mr. Stonestreet interested Mr. Noyes in finding a purchaser. Mr. Noyes was the brother-in-law of the respondent. After the property was sold, the appellant Eldrige R. Gerry paid to Mr. Stonestreet the commission agreed upon. The question whether these agents were acting for the respondent or the appellants is of no importance in the case, because it is conceded upon the record that the representations which were made were made directly by Mr. Gerry to the respondent. She does not claim that any misrepresentations were made by the agents. So that the question of agency is therefore entirely unimportant.

(2) The appellants next contend that the representations made by Mr. Gerry were true. This contention is based upon the evidence of Mr. Gerry to the effect that the representations made were that there were one hundred and ten to one hundred and twenty acres of irrigable land upon the claim; that there was a well of water on the place, which contained twenty-nine feet of water, and that in his opinion there was an abundance of water in the well to irrigate forty acres of the land, but that the well had never been tested. There is a conflict in the testimony as to whether he expressed an opinion or made the representations as a

matter of fact. The evidence on the part of the respondent tended to show that he represented that there were at least one hundred and ten acres of irrigable land upon the premises, and that he represented that there was an abundance of water in the well to irrigate forty acres. The court found, as a matter of fact, that he made these representations without any qualification. We are satisfied from an examination of the evidence that the weight of the testimony supports the findings of the court in these respects. It was abundantly shown that there were not one hundred and ten acres or one hundred and twenty of irrigable land upon the property, and it is abundantly shown that there was no water in the well of any consequence. The pump, which was placed upon the well at an expense of more than \$800 by the respondent, exhausted the water in one minute and a quarter. And it was conclusively shown that there was no water to irrigate any appreciable quantity of the land.

(3) It is next argued by the appellants that the respondent did not rely upon the representations made to her by Mr. Gerry, but relied upon her own observation and the advice of her brother-in-law. The fact is that when the respondent was informed of the opportunity to purchase the relinquishment upon the land in question, she, with the two real estate agents, one of whom was her brother-in-law, visited the appellants and the land. But it appears from the evidence that, at this time, the ground was covered with snow and she could not determine either the character of the soil or the amount of water available for irrigation purposes. She, at the same time, examined other property in the vicinity, and in a few days returned and again examined the appellants' place, but at that time there was snow upon the ground. The ground was frozen and she could not and did not discover the character of the soil or the amount of water in the well. She saw that there was a well, and she saw the general lay of the land. But she testified that she relied upon the statements of Mr. Gerry in regard to the

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quantity and character of the land and the quantity of water available. We think the great weight of the evidence is that she could not determine the verity of the representations made to her because of unfavorable conditions existing at the time, and did not rely upon her own observation, but relied wholly upon the representations that were made to her by Mr. Gerry, as she was justified in doing. *Duffy v. Blake*, 80 Wash. 648, 141 Pac. 1149.

(4) The appellants next argue that the court erred in finding for the respondent in the sum of \$1,100 damages. There was evidence to the effect that the land was worth more than \$1,600. There was also evidence to the effect that the land was worth less than \$200. Different witnesses placed the value of the land at different figures. Under these circumstances, we are inclined to follow the finding of the court, which was that the land, at the time of the purchase, was of no value except for grazing land, and did not exceed \$400.

(5) It is next argued by the appellants that the court erred in rendering judgment against the wife of Eldrige R. Gerry. There is no merit in this contention. It is not disputed that the appellant Mr. Gerry was a married man at the time he filed his desert location upon the claim. If he had acquired title to the property, it would have been community property. When he sold the relinquishment, the proceeds were, of course, community property. In short, Mr. Gerry was the agent of the community, attending to community business, and the community was liable for a refund of the money so acquired.

Upon an examination of the whole case, we are satisfied that the judgment of the trial court was in accordance with the facts, and it is therefore affirmed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11802. Department Two. August 13, 1914.]

**MATTIE KROHN *et al.*, Appellants, v. LOTTA HIRSCH,
Respondent.¹**

EXECUTORS AND ADMINISTRATORS — FINAL DISTRIBUTION — PERSONS CONCLUDED. A final decree of distribution, made upon due notice and unappealed from, decreeing the property to be community property of deceased and his widow and distributing the same to her as sole heir is final and conclusive, and cannot be attacked more than a year thereafter by one claiming an interest as sister and heir of deceased and that the property was his separate property.

CONSTITUTIONAL LAW — DUE PROCESS — CONSTRUCTIVE NOTICE IN PROBATE. The mode of giving notice in probate as provided by statute, although by publication and posting, preliminary to the rendering of orders and decrees, amounts to due process of law, making orders and decrees rendered in pursuance thereof as binding on interested parties as if brought into court by personal notice.

EXECUTORS AND ADMINISTRATORS — FINAL DISTRIBUTION — CONCLUSIVENESS—FRAUD—EXTRINSIC OR COLLATERAL—EVIDENCE—SUFFICIENCY. A final decree of distribution, made upon due notice and unappealed from, decreeing the property to be community property of deceased and his widow and distributing the same to her as sole heir, is final and conclusive on all the world, and will not be set aside at the suit of a claimant more than a year thereafter for alleged fraud in procuring the decree, praying that the property be declared held by defendant as involuntary trustee to the extent of claimant's interest therein, where it appears that claimant, an alleged sister and heir of deceased, had never been a resident of this state, and had no communication with, nor knew the whereabouts of, deceased for a period of seventeen years, but had communication with defendant prior to distribution of the estate, claiming to be a sister and heir of deceased, which defendant denied, that claimant, while having no actual notice of the administration of the estate until sometime after final settlement, had constructive notice thereof given strictly as prescribed by statute, that claimant was not prevented from appearing at the distribution hearing and protecting her alleged rights, nor induced to believe that they would be protected in her absence, but, on the contrary, defendant's acts and communications with claimant were at all times consistent with the course pursued by her in claiming the whole estate during ad-

¹Reported in 142 Pac. 647.

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ministration thereof, and she at all times dealt at arm's length in opposing the alleged rights of claimant; since defendant's fraud, if any, was involved in the question of defendant's right to take all the property of deceased as his wife and sole heir, and was not extrinsic and collateral to the merits of the matter before the court, but inhered therein and was concluded by the decree.

TRUSTS—CONSTRUCTIVE TRUSTS—FRAUD IN ACQUISITION OF PROPERTY—PROBATE PROCEEDINGS. Where property was awarded to defendant as widow and sole heir of deceased, by a decree of distribution rendered upon due notice, conclusive and binding upon all parties, it cannot be claimed, more than one year thereafter, that defendant holds the property as involuntary trustee to the extent of an interest claimed by one alleged to be a sister and heir of deceased, on the ground of fraud perpetrated by defendant in procuring the decree; since the issue to be determined was defendant's right to take all of the property of deceased as his wife and sole heir, and is concluded by the judgment, in the absence of fraud extrinsic of the merits of the controversy.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 1, 1913, dismissing an action to quiet title and for partition, after a trial on the merits. Affirmed.

Geo. W. Korte, Edgar J. Wright, and R. W. Huntoon,
for appellants.

Clise & Poe, for respondent.

PARKER, J.—The plaintiffs seek recovery from the defendant of their claimed interest in certain real property, situated in the city of Seattle, and also seek partition of the property between themselves and the defendant. The defendant holds the property under a decree of distribution rendered by the superior court for King county in the administration of the estate of James McCarthy, deceased, wherein the whole of the property was awarded to respondent as the widow of James McCarthy. The plaintiff Mattie Krohn claims an interest in the property as the sister and heir of James McCarthy upon the ground that it was his separate property, and seeks to

avoid the decree of distribution because of alleged fraud on the part of the defendant in procuring it. The other plaintiffs claim an interest in the property as grantees of the plaintiff Mattie Krohn. A trial before the court resulted in judgment in favor of the defendant, denying the relief prayed for by the plaintiffs, and quieting the defendant's title to the whole of the property as against the claims of the plaintiffs. From this disposition of the cause, the plaintiffs have appealed.

The controlling facts are not in controversy here, and may be summarized as follows: On August 24, 1910, James McCarthy, being then a resident of the city of Seattle, died in Alaska, while temporarily absent from home. He left surviving him his wife, this respondent, who has since married again. He left real property of considerable value, situated in the city of Seattle, being the property here in controversy. On September 16, 1910, respondent filed, in the superior court for King county, her petition for letters of administration upon the estate of James McCarthy, alleging, among other things, "that to the best of petitioner's knowledge and belief, said decedent left no heirs save only this petitioner." Due notice being given of hearing upon this petition, as the law directs, respondent was, by the court, duly appointed and thereafter qualified as administratrix of the estate, and proceeded with its administration. On October 2, 1911, the estate being fully administered, and ready for distribution of the remaining property, respondent filed her petition for distribution, alleging, among other things:

"That the said James McCarthy, deceased, was at the time of his death married to your petitioner, and the said marriage was without issue, and said deceased died without issue.

"That the said James McCarthy died intestate in the District of Alaska on the 24th day of August, 1910, and that at the time of his death he was a resident of the city of Seattle in said King county, being temporarily absent therefrom, leaving him surviving your petitioner, his widow, as his sole

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heir at law, all of the estate of said deceased being community property;”

and praying:

“That after due notice given, the estate remaining in the hands of your petitioner as aforesaid may be distributed to her as the widow and sole heir of said deceased.”

Thereafter, on November 9, 1911, the matter of distribution came on regularly before the court upon order to show cause and the publication and posting thereof, had strictly in compliance with the statute, and a decree of distribution was duly rendered by the court, decreeing the whole of the property to be community property of deceased and respondent, and distributing the same to respondent as his widow and sole heir. This decree has never been appealed from, and remains in full force and effect. On February 13, 1913, over one year after the rendering of this decree of distribution, this action was commenced by appellants in the superior court for King county, praying that the decree of distribution be set aside and declared void as to appellant Mattie Krohn, and that she be awarded an interest in the property as an heir of James McCarthy, deceased, resting such claim upon the theory that she is a sister of James McCarthy, and that the property was his separate property. Thereafter, by leave of the trial court, the prayer of the plaintiffs' complaint was amended by asking that respondent be declared an involuntary trustee of such interest in the property as is claimed by the plaintiff Mattie Krohn, as heir of James McCarthy, deceased, and that partition of the property be decreed accordingly between appellants and respondent.

Appellant Mattie Krohn has never been a resident of the state of Washington, but is now a resident of South Dakota, and has resided in that state for some thirty years past. In the fall of 1910, while the estate of James McCarthy was in course of administration in the superior court for King county, and nearly a year before the decree of distribution therein

awarding the property to respondent, appellant Mattie Krohn had some correspondence with respondent in which she claimed to be a sister of James McCarthy, and in which respondent denied that she, Mattie Krohn, was a sister of respondent. Appellant Mattie Krohn learned of the death of James McCarthy within a short time, probably about two months, after his death occurred. Appellant Mattie Krohn did not have actual knowledge of the administration of the estate of James McCarthy in the superior court for King county until some time after the final settlement of the estate, and the rendering of the decree of distribution therein, though she had constructive notice thereof given strictly as our statute prescribes. We think the evidence before us warrants the conclusion that respondent, at all times up until the trial of this case, acted in good faith in denying the claim made by appellant Mattie Krohn that she was a sister of James McCarthy, and that respondent also acted in good faith in claiming to be the sole heir of her husband James McCarthy. According to Mattie Krohn's own testimony, she had had no communication with James McCarthy, whom she claimed to be her brother, and had known nothing of his whereabouts, for a period of seventeen years prior to his death.

It has become the settled law of this state that orders and decrees of distribution made by superior courts in administering estates, when made upon due notice, as provided by our statutes, are final adjudications, conclusive, and binding upon all the world. Such adjudications, as has been said, have all the force and effect of judgments *in rem*. In *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990, we said, touching the effect of a decree of distribution: "Its very object and purpose is to judicially determine who takes the property left by the deceased." Commenting upon these observations, in *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492, we said:

"It was the purpose of the court in that case to forever set at rest the opinion, prevailing to some extent, that a probate

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proceeding was something of less importance than an ordinary civil action, and that a decree formally entered could be questioned by any one although a party, where, as in that as well as in this case, it was thereafter believed to have been entered upon a mistake of fact or an erroneous conception of the law."

See, also, *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847; *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350; *In re Hoscheid's Estate*, 78 Wash. 309, 139 Pac. 61. These decisions also render it plain that this court holds that the statutory manner of giving notice preliminary to the rendering of orders and decrees in probate, although such notice is only constructive, that is, by publication and posting, amounts to due process of law, so that orders and decrees rendered in pursuance thereof are as binding upon all interested parties, so far as the subject-matter before the court is concerned, as if such parties were brought into court by personal notice. So thoroughly has this become the settled law of this state that further review and citation of authorities seems at this time unnecessary. We quote, however, as an expression of the reason and necessity of the rule, the language of Justice Bradley, speaking for the supreme court of the United States in *Case of Broderick's Will*, 88 U. S. 503, as follows:

"The constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual."

Counsel for appellants apparently concede this to be the law, but seek to avoid the effect of this decree of distribution by attributing to respondent fraud in procuring its rendition. It seems quite clear to us that respondent did nothing to the prejudice of appellant Mattie Krohn's rights as an heir of James McCarthy if, in fact, she was such; unless it be held that respondent presented to the superior court, upon the distribution hearing, evidence which was not true touching the question of the nature of the property left by James McCarthy, and the question of who was entitled to take the same as heir and distributee. These questions, however, go to the merits of the very matter there in issue and to be decided by the court, and as to which appellant Mattie Krohn was given every opportunity to be heard which the law of this state accorded her. Respondent, so far as this record shows, did absolutely nothing tending to prevent appellant Mattie Krohn from appearing at that hearing, and presenting evidence touching her claimed rights. Neither did respondent do or say anything inducing appellant Mattie Krohn to believe that her rights, as she claimed them, would be protected if she did not appear and make her claim at that hearing. Indeed, respondent's acts and communications to appellant Mattie Krohn were consistent with, and would even suggest, the very course that she pursued in making claim to all of the property of her deceased husband, in the administration of the estate. Respondent asserted her right to this property, in effect, when she filed her petition for letters of administration. She again asserted it in her petition for distribution, and even in her communications with appellant Mattie Krohn, she denied that Mattie Krohn was a sister of her deceased husband. She was, in fact, at all times, dealing at arm's length and in open antagonism to the claims of Mattie Krohn. In *Greene v. Greene*, 2 Gray 361, 61 Am. Dec. 454, Chief Justice Shaw said:

"The maxim that fraud vitiates every proceeding, must be taken, like other general maxims, to apply to cases where

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proof of fraud is admissible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted."

In *United States v. Throckmorton*, 98 U. S. 61, Justice Miller, speaking for the court, refers to the decision of Chief Justice Shaw in the *Greene* case as being "perhaps the best discussion of the whole subject to be found," and adds this pertinent observation:

"The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. . . . The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent; would be greater by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

In *Fealey v. Fealey*, 104 Cal. 354, 38 Pac. 49, 43 Am. St. 111, Justice De Haven, speaking for the court, said:

"In *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. 159, the question was very carefully considered, and this court announced the same rule, saying: "The reason of this rule is that there must be an end to litigation; and when the parties have once submitted a matter, or have had an opportunity of submitting it, for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy . . . Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it

can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*.' These cases are, we think, conclusive of the one now before us. So far as concerns the question here presented, there is no difference in principle in the nature of the judgments under review in the above-cited cases and the order here sought to be annulled. The order setting apart the homestead to defendant (no homestead having been declared during the lifetime of the deceased) operated to vest in the defendant a title to the land so set apart (*Estate of Boland*, 43 Cal. 640; *Estate of Moore*, 96 Cal. 522); and such order was in the nature of a judgment *in rem* (*Kearney v. Kearney*, 72 Cal. 591); and, the court having jurisdiction to pronounce it, it is conclusive upon plaintiff and all persons interested in the estate, and can only be successfully attacked in equity upon the same grounds upon which a judgment *in personam* may be annulled."

While these views find some dissent in the earlier decisions, we think there are few, if any, decisions rendered in recent years in conflict therewith. 23 Cyc. 1024. *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490.

It often becomes a matter of some difficulty, in a given case, to determine when the alleged fraud is extrinsic and collateral to the merits of the matter before the court for determination. In support of their contention that respondent committed fraud in the procuring of this decree of distribution, extrinsic of the merits of the question then before the court, counsel for appellants rely principally upon the decisions of the California court in certain cases, which, we think, can be differentiated from the case before us.

In *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. 98, it was sought to set aside a decree of distribution upon the ground of fraud on the part of the distributee in procuring the same. In that case, the fraud was held to be extrinsic and such as would avoid the decree. A critical reading of that decision will show, however, that the distributee, the executrix and mother of minor children, procured the decree in her favor as against such minor children, without

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their being heard or represented in court upon the hearing other than by herself as their natural guardian. Manifestly they were not afforded that opportunity to be heard which the law accords to minors. The mother was not dealing at arm's length with the minors in obtaining the decree adverse to their interest, but was there as their representative as well as her own representative.

In *Aldrich v. Barton*, 138 Cal. 220, 71 Pac. 169, 94 Am. St. 43, there was involved an accounting of trustees and an approval of their account by the superior court. Apparently the proceeding was not one strictly in probate, since it involved an accounting by the trustees as such after distribution of the estate, the trustees holding the property by virtue of the distribution to them as such. They rendered an account to the court upon a mere posting of ten days' notice during the absence of their *cestui que trust* from the state, without the knowledge of their *cestui que trust*, and nothing appearing upon the face of the account to indicate the fraud which they were there perpetrating upon their *cestui que trust*. We think this is not analogous to a case like the one before us, wherein there was rendered a solemn judgment upon due process of law, touching a matter, to wit, heirship and distribution, which was put directly in issue by the allegations of the petition of the respondent.

In *Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, there was involved a settlement of the account of a guardian of an insane person rendered and approved by the court a few days following the restoration of the insane person to his reason. The guardian apparently omitted from his account, and failed to account for, property which was wholly unknown to his ward at that time. The order settling the account was not a final adjudication as to an accounting of property concealed and not brought to the court's notice in the guardian's account. Here, again, we have a case where the person procuring the adjudication was not dealing at arm's length with his ward. He was concealing facts which were peculiar-

ly within his knowledge and without the knowledge of his ward.

In *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184, we have another situation where the disposition of the cause was apparently largely influenced by the fact that the sale and disposition of the property in the probate proceeding was brought about by a connivance of the natural guardian of minor children with others, which was held to be a fraud upon their rights of such extrinsic nature as to render the orders of the court not binding upon the children when their rights were sought to be protected in a subsequent suit in equity.

In *In re Walker's Estate*, 160 Cal. 547, 117 Pac. 510, 36 L. R. A. (N. S.) 89, deceased died, supposedly intestate, his estate was administered and in due course distributed by the usual decree, the distributees thereunder receiving the property. Some eight months after the rendering of the decree of distribution, a will of the deceased was filed with a petition for its probate. The distributees under the prior decree contested the probate of the will upon the ground that the decree of distribution under which they held was a conclusive adjudication of the title to the property of the estate in them, and that, therefore, the will was not entitled to be admitted to probate. The majority opinion in that case holds that it was proper for the probate court to receive proof of and establish the will, to the end that those entitled to take under it might be in a position to prosecute their rights in equity, the court declining, in substance, to decide what the rights of those named in the will as devisees would be as against the distributees under the prior decree of distribution. There are remarks made in the decision which might seem to indicate that the rights of the devisees under the will would be held superior to those of the distributees under the prior decree of distribution, but we do not think it was there so decided.

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The theory of counsel for appellant, in its final analysis, seems to be not that this decree of distribution awarding the property to respondent is void as such, but that, because of what counsel conceives to be fraud perpetrated by respondent in the procuring of the decree, she took the property thereby awarded to her as an involuntary trustee for appellant Mattie Krohn to whatever extent Mattie Krohn would have inherited from James McCarthy as his sister and heir. We are quite unable to agree with this contention. The very question to be determined, and which was in issue before the court, not only by virtue of the law, but by virtue of respondent's allegations in her petition for distribution, was her right to take all of the property left by James McCarthy as his wife and sole heir, as against all the world, including appellant Mattie Krohn, who had notice of that hearing strictly in the manner required by statute—constructive notice, it is true, but nevertheless, notice such as has been held sufficient as due process of law to support a decree of distribution. To say that respondent now holds any part of this property in trust for Mattie Krohn is nothing more nor less than saying that the question of who was entitled to take the property left by James McCarthy was not correctly determined upon the merits by the superior court upon the distribution hearing, and that appellant Mattie Krohn should now be awarded a new trial upon that question more than one year after it has been solemnly adjudged against her and all the world, upon due notice. As between respondent and appellant Mattie Krohn, that was an adverse proceeding. To us, it is inconceivable that a party can be considered as holding in trust for his adversary property which has been awarded to him as against his adversary by a judgment rendered upon due notice in a proceeding instituted and carried on for the very purpose of determining the claims of each as against the other, to the property involved, in the absence of fraud, or some fact extrinsic of the merits of the controversy in issue, such as would avoid such judgment.

We are of the opinion that such is not the law, and that there has not been any fraud shown to have been committed by respondent as against the rights of appellant Mattie Krohn, extrinsic of the merits of the questions involved in and disposed of by the decree of distribution.

The judgment is affirmed.

CROW, C. J., MAIN, MOUNT, and FULLERTON, JJ., concur.

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UNITED IRON WORKS, *Appellant*, v. MILLARD S. HOSEA *et al.*,
Respondents.¹

MECHANICS' LIENS — CONTRACTS — PERFORMANCE — ACCEPTANCE OF WORK. Where plaintiff's assignor agreed with defendant to furnish materials and install a refrigerating plant, and warranted the plant to furnish a specified amount of refrigeration and to work to the satisfaction of defendant, but the plant proved defective and, after repeated effort, any attempt to put it in working order was abandoned, the fact that defendant mortgaged the premises while the plant was being installed and that he later conveyed the premises pending suit to foreclose a lien thereon, did not constitute an acceptance of the work.

SAME—DEFAULT OF CONTRACTOR—LIABILITY OF OWNER FOR PARTS USED. Where contractors installed a refrigerating plant under a contract guaranteeing a certain amount of refrigeration and that the plant would work to the satisfaction of the purchaser, but the plant proved defective and all attempts to put it in working order were finally abandoned, the contractors are not entitled to recover the entire purchase price because certain parts of the plant were retained and used by the purchaser in the necessary installation of another plant, but can only recover for the parts retained and used in the installation of the second plant.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 9, 1913, upon findings in favor of the defendants, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 142 Pac. 673.

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Opinion Per MAIN, J.

B. B. Adams and C. D. Randall, for appellant.

Scott & Campbell, for respondents Hosea.

Don F. Kizer, for respondent Stanton Company.

MAIN, J.—This is an appeal from a judgment of the superior court denying the foreclosure of a claim for lien.

The trial court found the facts to be substantially as follows: Watson & Graham, copartners, on the 7th day of June, 1912, entered into an agreement with the defendant Millard S. Hosea, whereby they agreed to furnish materials and install, in a building owned by Hosea, a refrigerating plant of sufficient size to furnish ample freezing capacity for two cooling rooms and two counters of given dimensions; and in addition thereto, thirty per cent more refrigeration than the amount required to keep the rooms and counters at a proper temperature. The plant was guaranteed, not only to furnish the amount of refrigeration specified, but to work to the satisfaction of Hosea. The contract price was \$1,150.

After making the agreement and while the plant was in the process of installation, but before it was completed, Hosea and wife conveyed the lands and premises upon which the refrigerating plant was being installed to E. H. Stanton Company, a corporation, by warranty deed, for the purpose of securing a loan in the sum of \$25,000. The installation of the plant was commenced during the early part of June, and was completed about the last of the same month. The plant was not sufficient in size or capacity to meet the requirements of the contract, was of inferior material, and not properly installed. It never worked satisfactorily nor furnished sufficient refrigeration for the purposes agreed upon. Watson & Graham attempted to make it run practically every day from the date of its installation for a period of five or six weeks. After repeated attempts to make the plant work, they abandoned any attempt to get it into working order, and so notified Hosea. The purpose of the defendant Hosea in having the plant installed was to keep fresh meats and other perish-

able commodities at low temperature, the building being used as a public market. Because of the defective plant and its defective installation, this purpose was not accomplished. It became necessary for Hosea to tear out the greater portion of the plant and install a different plant in lieu thereof. The only portion of the plant installed by Watson & Graham that the defendant Hosea could use and did use, were seven hundred feet of pipe, condenser, oil trap, ammonia receiver, two gauges, connections and valves, which were found to be of the value of \$257. The balance of the plant was utterly worthless and was torn out and tendered back to Watson & Graham. Before the completion of the plant, \$117.95 had been paid as a part payment upon the contract price.

On the 30th day of August, 1912, Watson & Graham filed for record, in the office of the auditor of Spokane county, a claim for lien upon the building and the lots upon which it stood, for the sum of \$1,197. Before the commencement of the action, this claim for lien was assigned to the plaintiff. A personal judgment was entered in favor of the plaintiff and against the defendants Hosea and wife for the sum of \$139.05, this being the balance which was due for the materials furnished by Watson & Graham and which were used when the plant was installed by another firm. The plaintiff appeals.

It is claimed that Hosea and wife, by mortgaging the property during the time the plant was being installed, thereby exercised acts of ownership over it which constituted an acceptance. Obviously this contention cannot be sustained. The deed was made only for the purpose of security and was executed and delivered prior to the time when the acceptance of the plant was due. By the contract, the plant was guaranteed and was not to be accepted until it worked to the satisfaction of Hosea. Neither did the conveyance of the premises while the suit was pending constitute an acceptance. Hosea notified Watson & Graham to either make the plant work or remove it. They did neither. Prior to the conveyance, the first plant as installed by Watson & Graham had

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been removed and the second one had been put in place by another firm. The trial court did not err in refusing to enter judgment for the entire purchase price of the refrigerating plant because certain parts thereof were retained and used when the second plant was installed. Watson & Graham, as the court found and as the evidence shows, abandoned any attempt to make the plant which they installed work. The parts of the plant removed were taken to the E. H. Stanton Company for the purpose of repair and adjustment. It was there found impossible to make the plant work. Thereupon the second plant was installed, using such parts of the first plant as had not been removed. It seems reasonably plain that, under the facts, Hosea would have the right to remove all those portions of the plant which could not be utilized, and be held to pay for only those portions which he retained and used in connection with the second installation.

The judgment will be affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

[No. 11960. Department Two. August 13, 1914.]

HOUTCHENS COMPANY, *Appellant*, v. B. F. NICHOLS *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS—DEFINITENESS. A contract reciting that each party to an exchange of properties agrees to pay "a commission of two and one-half per cent, or such as agreed upon," is void as within the statute of frauds, since there is no definite basis on which to compute a commission, but merely an agreement for a commission to be subsequently agreed upon.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered November 12, 1913, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action on contract. Affirmed.

Oscar Cain, for appellant.

John Pattison, for respondents.

MOUNT, J.—On June 4, 1912, the appellant as a real estate broker caused the respondent B. F. Nichols and one A. B. Olson to enter into a contract for the exchange of properties. The first paragraph of this contract recites that the respondent B. F. Nichols, in consideration of the agreement to be performed by Mr. Olson, will convey by warranty deed the lot upon which is located a certain fifty-six room apartment house, in the city of Spokane. The second paragraph recites that A. B. Olson will convey certain real estate in Walla Walla county to Mr. Nichols in exchange for the Spokane property. The third paragraph provides, that if either of the parties to the contract shall fail to perform the agreement, he shall be held unto the other in the sum of \$2,000 as liquidated damages. The contract then recites: "Each party agrees to pay J. E. Houtchens Company a commission of 2½% or such as agreed upon." The contract was signed

¹Reported in 142 Pac. 674.

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by Mr. Nichols and Mr. Olson. Mr. Nichols failed to comply with the agreement. The appellant then brought this action, alleging that the property belonging to Mr. Nichols was worth \$78,000 and that its commission thereon was $2\frac{1}{2}$ per cent, amounting to \$1,950. For a second cause of action, it alleged that the property of Mr. Olson was worth \$80,000, and seeks to recover damages in the sum of \$2,000 for the loss of its commission by reason of the failure of Mr. Nichols to comply with his contract.

After the appellant had offered the contract in evidence, the trial court was of the opinion that it was within the statute of frauds, and for that reason directed a verdict in favor of the respondents. This appeal followed.

The sole question involved is the sufficiency of the contract. The statute, at Rem. & Bal. Code, § 5289 (P. C. 203 § 3), provides:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The contract in this case was a contract between Mr. Nichols and Mr. Olson. The contract did not state the value of either property, but it recited, as above stated, that each party agrees to pay a commission of $2\frac{1}{2}$ per cent, or such as agreed upon. It is plain, we think, that the words "a commission of $2\frac{1}{2}$ per cent or such as agreed upon" is not an agreement to pay a definite commission, but it is an agreement merely for a commission to be subsequently agreed upon. It might be less or more than $2\frac{1}{2}$ per cent.

In *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34, where the contract was "their agreed upon commissions," we said:

"While there are cases holding that, under a statute similar to our own, the terms of the broker's contract do not have to

be set out in the memorandum or writing required by statute, the exact question has been before this court in the case of *Footte v. Robbins*, 50 Wash. 277, 97 Pac. 108, and in the case of *Keith v. Smith*, 46 Wash. 181, 89 Pac. 473, wherein it was held that the terms of the employment must be set out in writing. In the first case cited the court said: "The unmistakable purpose of the statute was to avoid any such method (resort to oral evidence) of fixing the extent of the liability or the liability itself, of either a vendor or a vendee for the payment of a commission."

In the case of *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 1030, where a letter was written to the broker saying, "Keep working for this and we will pay you for your trouble if we can close with any of them," we said:

"But it is manifest that this is insufficient for the purpose under the authority of the cases of *Keith v. Smith*, 46 Wash. 181, 89 Pac. 473; *Footte v. Robbins*, 50 Wash. 277, 97 Pac. 108; *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34; and *Crouch v. Forbes*, 63 Wash. 564, 116 Pac. 14. These cases lay down the rule that a writing sufficient to satisfy the statute must be coextensive with the stipulations of the parties; that is to say, it must express the entire contract and leave nothing that pertains to the essentials of the contract to be supplied by parol. The contract here in question neither describes the property to be sold, nor specifies the amount of commission or compensation that will be paid for the services, and under the rule as we have heretofore announced it is plainly insufficient."

See, also, to the same effect: *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947; *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660. Under this rule, it is apparent that the contract in this case is prohibited by statute, and is therefore void, because no basis upon which to compute a commission is fixed by the contract, and no fixed commission is agreed upon. The trial court was therefore right when it directed a verdict in favor of the respondent.

The judgment is therefore affirmed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

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[No. 11832. Department Two. August 13, 1914.]

CHARLES FLESSHER, *Respondent*, v. CARSTENS PACKING
COMPANY, *Appellant*.¹

FOOD—DISEASED MEAT—SALES—ACTIONS—ISSUES. A complaint alleging that "the defendant negligently and carelessly sold and delivered to plaintiff a certain piece or parcel of poisoned and diseased meat . . . which was then and there unfit for human food, etc." determines the action as one for negligence of defendant in selling diseased meat unfit for human food, and it is error for the court to disregard the allegations of the complaint and instruct the jury that defendant's liability is to be determined under the provisions of the pure food act, Rem. & Bal. Code, §§ 5453, 5455, and to read the same to the jury as the law of the case.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered October 18, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

James W. Carr and Kerr & McCord, for appellant.

Garland & McLane, for respondent.

MORRIS, J.—Respondent brought this action against appellant to recover damages for injuries alleged to have been sustained by eating diseased dried beef. He obtained judgment below, and the defendant appeals.

Many errors are urged against the judgment, but from the conclusion we have reached, only one need be noted. The action is founded upon negligence, it being alleged that "the defendant negligently and carelessly sold and delivered to Charles Flesscher, plaintiff herein, a certain piece or parcel of poisoned and diseased meat known as dried beef, which said meat was then and there unfit for human food and injurious to the life and health of a person eating it." In submitting the case to the jury, the lower court disregarded the allegations of the complaint, and instructed the jury that

¹Reported in 142 Pac. 694.

the liability of the defendant was to be determined under the provisions of the pure food act of 1907, providing in § 1, Laws 1907, p. 478 (Rem. & Bal. Code, § 5453; P. C. 195 § 1):

"No person, firm or corporation shall, within this state, sell, offer for sale, have in his possession with intent to sell, or manufacture for sale, any article of food or drug which is adulterated or misbranded within the meaning of this act."

And § 3 (Rem. & Bal. Code, § 5455; P. C. 195 § 5):

"For the purposes of this act an article shall be deemed to be adulterated: . . . In case of food: . . . If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, . . ."

These sections were read to the jury as the law of the case that was to govern them in determining the liability of the defendant. Appellant took exception to the giving of these instructions, and now urges them as error.

It seems to us the exception must be sustained. The character of the action is to be determined from the allegations of the complaint, which alleged, as the only basis for recovery, the negligence of the respondent in selling diseased meat unfit for human food. No mention was made of the pure food statute, nor was any violation of it charged. The case to be submitted to the jury was the one framed by the pleadings and not some other. If respondent desired to submit an issue upon the violation of the pure food act, he should have pleaded and proved it. It was not permissible to go outside the issues as framed to strengthen the one case or weaken the other. *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370.

We have in this state a statute known as the factory act, providing for the guarding of dangerous machinery. Any workman injured through the negligence of his employer because of the unguarded condition of dangerous machinery

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could, until the workmen's compensation act went into effect, maintain a common law action for negligence, or he might sue under the factory act. But having selected his form of action, he must abide by it. He could not found his action upon common law negligence, and recover for a violation of the factory act. The same principle is applicable here. Whatever remedies may have been afforded respondent because of the act of appellant in selling him diseased meat, the eating of which caused him injury, he selected the common law form of negligence and he must abide by it. Appellant's liability is to be determined from the proof of the allegations made against it, and not because of the violation of some statute under which no opportunity has been afforded it to frame an issue or make a defense.

For these reasons, we think the case was not properly submitted to the jury, and that appellant's exceptions to the instructions must be sustained. The judgment is reversed.

CROW, C. J., MOUNT, and PARKER, JJ., concur.

[No. 11915. Department Two. August 13, 1914.]

CALIO FERDENANDO, *Appellant*, v. MILWAUKEE MECHANICS'
INSURANCE COMPANY, *Respondent*.¹

INSURANCE—ACTIONS—PROOFS OF LOSS—WAIVER—AUTHORITY OF AGENT. An insurance agent is not authorized to waive proofs of loss under an insurance policy, merely from the fact that he solicited the insurance and delivered the policy to the insured.

SAME—PROOFS OF LOSS—SUFFICIENCY. Evidence that the agent requested the insured to come to his office and make proofs of loss, that he did so and was handed a paper which he was told to copy and return, which he did, and was told that it was proofs of loss and nothing more need be done, is insufficient to show notice of loss to the company, in the absence of a showing of authority on the part of the agent to adjust the loss or waive proof thereof.

SAME—PROOFS OF LOSS—WAIVER—DENIAL OF LIABILITY. The fact that an insurance company denied liability under a policy is not a waiver of proofs of loss, where the only denial of liability was contained in the answer, after suit brought against the company.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered October 23, 1913, dismissing an action on an insurance policy, upon granting a nonsuit. Affirmed.

L. H. Prather, for appellant.

Cullen, Lee & Matthews, for respondent.

MORRIS, J.—Appellant, having brought his action to recover upon a policy of insurance, was defeated in the lower court because of his failure to comply with the provisions of the policy as to proofs of loss, the lower court holding that a local insurance agent, having authority to solicit and write contracts of insurance, has no authority as such agent to adjust the loss under the policy or to waive proofs of loss. The facts need not be stated, as they are no broader than the above statement of the ruling of the lower court. In addition to these defenses, the respondent set up others

¹Reported in 142 Pac. 693.

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which, if sustained, would have defeated the action, but since the judgment was entered before respondent was called upon to offer its proof, the record presents no other questions than these two rulings.

The law is well settled that a local agent has no such power where the only authority relied upon is proof of the fact that he solicited the insurance and, having received it, delivered the policy to the insured. *Hill v. Phoenix Ins. Co.*, 14 Wash. 164, 44 Pac. 146; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 15 Atl. 353, 6 Am. St. 144, 1 L. R. A. 216; *Harrison v. Hartford Fire Ins. Co.*, 59 Fed. 792; *Ermentrout v. Gerard Fire & Marine Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 56 Am. St. 485, 30 L. R. A. 346; Clement, *Fire Insurance*, pp. 204, 205, 217, 440; Cooley's *Briefs, Insurance*, pp. 3495, 3498. Where there is proof of apparent authority or custom, or other facts justifying the finding that the company had clothed its soliciting agent with such authority, a different question is presented. But no such proof is present or offered in this case.

It has also been held that the agent may act for the insured in giving the company notice of loss, and that, where the notice passes from the insured through the agent to the company, it will be sufficient. But there was no proof, or offer of proof, that would bring the case within this rule. The only offer of proof was that, after the loss, the agent told the insured to come to his office and make proofs of loss; that the insured did so, and was handed a paper which he was told to copy and return; that he did so, and the agent then told him it was the proofs of loss and that nothing more need be done. Whether or not the paper handed the insured and returned to the agent was proofs of loss, or whether, if proofs of loss, it reached the company, we do not know, as the only reference to it is included in the offer as above made, which was rejected by the court unless it was accompanied by an offer to prove the authority on the part of the agent to adjust the loss or waive proofs of loss. Ad-

mittedly, if it could be shown that the agent had apparent authority to act regarding the loss, it might be held that such authority embraced the receiving of proofs of loss or the waiver thereof. But the proof is void of any fact from which such authority could be held, and such being the case, the holding of the lower court must be sustained.

The appellant contends that, because the company denied liability under the policy, it waived proof of loss. In common with other courts, we have held in *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941, and other cases, that, when the policy is repudiated on the ground that there is no contract and no liability before the time expires for furnishing proofs of loss, such denial is a waiver of such proof. But this rule has no application where, as here, the only denial of liability is contained in the answer of the company upon suit being brought against it. A fire insurance company is entitled to plead any defense it may have to an action upon one of its policies, and such plea must be given effect, unless by its acts, or those of its duly authorized agents, it has waived such defense before the bringing of suit. See note to *Graham v. German American Ins. Co.*, 15 L. R. A. (N. S.) p. 1074.

Upon the facts as here presented, the judgment of the lower court is sustained.

CROW, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 11998½. Department Two. August 13, 1914.]

CREDITORS CLAIM & ADJUSTMENT COMPANY, *Appellant*, v.
NORTHWEST LOAN & TRUST COMPANY, *Respondent*.¹

BANKS AND BANKING — GUARANTY — *ULTRA VIRES* — ESTOPPEL. A bank is estopped to set up the defense of *ultra vires* in the making of a contract guaranteeing the payment of an account by one of its customers, a contractor, to a manufacturing company for supplies furnished, where the bank, upon receipt of a letter from the manufacturing company expressing some doubt as to the binding force of the guaranty, and requesting confirmation of a telegram previously sent notifying them that the bank guaranteed the account, wrote them that it was secured by a note for \$2,000 and that its telegraphic guarantees were accepted by other banks, and that the telegram in question "is a guarantee in fact;" since the bank, though neither prohibited nor given power by statute to enter into such contracts, having lulled the company into a position of financial security upon which it relied to its injury, public policy demands an enforcement of the contract.

Appeal from a judgment of the superior court for Spokane county, Mills, J., entered January 24, 1914, upon findings in favor of the defendant, in an action on contract, tried to the court. Reversed.

Belden & Losey (Henry R. Newton, of counsel), for appellant, contended, *inter alia*, that a corporation has, in addition to the powers expressly granted, certain implied powers incidental to and necessary to carry into effect the powers granted. 10 Cyc. 1097; 29 Am. & Eng. Ency. Law (2d ed.), 46, 47; *Flaherty v. Portland Longshoremen's Benevolent Soc.*, 99 Me. 253, 59 Atl. 58; *Sherman v. American Congregational Ass'n*, 113 Fed. 609; *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843; *Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co.*, 145 Iowa 491, 122 N. W. 930; *Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 53 N. E. 711, 64

¹Reported in 142 Pac. 670.

L. R. A. 395. That although a contract be without the powers of a corporation, it is estopped to invoke the plea of *ultra vires* when the same is executed, the corporation has received benefits thereunder, and the other party cannot be placed in *statu quo*. *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Spokane v. Amsterdamsch Trustees Kantoer*, 22 Wash. 172, 60 Pac. 141; *Dewey v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 351, 51 N. W. 1063; *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. L. 497, 41 Atl. 690; *State Board of Agriculture v. Citizens St. R. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Osmer v. LeMay-Wegmann Brokerage Co.*, 155 Mo. App. 211, 134 S. W. 65; *McQuaig v. Gulf Naval Stores Co.*, 56 Fla. 505, 47 South. 2, 131 Am. St. 160; *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72, 38 S. E. 252; *Farmers & Merchants Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136; *Seeber v. Commercial Nat. Bank*, 77 Fed. 957; *First Nat. Bank of Greenville v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828; *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186; *Wittmer Lum. Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 868; *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316. The public policy of a state is to be determined from the constitution, laws and judicial decisions—not from private opinions. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 70 Fed. 201, 30 L. R. A. 193; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 582, 56 Am. St. 119, 35 L. R. A. 309; *Giant-Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470. Public policy requires that freedom to contract shall not be lightly interfered with, and contracts should not be held invalid, except in cases free from doubt. *Hartford Fire Ins. Co. v. Chicago, M. & St. Paul R. Co.*, 175 U. S. 91; *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. 260. Public policy requires corporations to observe those principles of common honesty and fair dealing appli-

cable to individuals. *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134; *Seeber v. Commercial Nat. Bank*, 77 Fed. 957.

Cordiner & Cordiner and *A. E. Gallagher*, for respondent, contended, *inter alia*, that the defendant had no power to enter into the contract. 10 Cyc. 1109; 5 Cyc. 590; 1 Brandt, Suretyship and Guaranty (3d ed.), § 12; Cook, Corporations (6th ed.), § 774; 4 Clarke & Marshall, Private Corporations, § 134; 3 Am. & Eng. Ency. Law (2d ed.), p. 800; *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449; *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642; *National Park Bank v. German-American Mutual Warehouse & Security Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557; *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 69 Neb. 220, 95 N. W. 819; *Id.*, 62 Neb. 472, 87 N. W. 156; *Norton v. Derby Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Wheeler v. Home Sav. & State Bank*, 188 Ill. 34, 58 S. E. 598; *National Bank of Commerce v. First Nat. Bank of Kansas City*, 61 Fed. 809. The contract of guaranty in question is strictly an *ultra vires* contract, and not binding on defendant because beyond its power to make, and defendant is not estopped to set up defense of *ultra vires*. *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067; *Spencer v. Alki Point Transportation Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. 1058; *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225; *Kom v. Cody Detective Agency*, 76 Wash. 540, 136 Pac. 1155; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966; *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552; *Pearce v. Madison & I. R. Co.*, 21 How. 441; *Pittsburgh, C. & St. L. R. Co. v. Keokuk*

& *Hamilton Bridge Co.*, 131 U. S. 371; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 36 Am. St. 71, 18 L. R. A. 252; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Day v. Spiral Spring Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; *California Bank v. Kennedy*, 167 U. S. 362; *Deaton Grocery Co. v. International Harvester Co. of America*, 47 Tex. Civ. App. 267, 105 S. W. 556; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *McCormick v. Market Bank*, 165 U. S. 538; *Bowen v. Needles Nat. Bank*, 94 Fed. 925. There can be no estoppel as against defendant. 11 Am. & Eng. Ency. Law (2d ed.), 425; 11 Cyc. 738, 741; *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 63 Am. St. 302, 39 L. R. A. 725; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765; *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452; *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293; *McKeen v. Naughton*, 88 Cal. 462, 26 Pac. 354; *Holcomb v. Boynton*, 101 Ill. 294, 37 N. E. 1031; *Clark v. Parsons*, 69 N. H. 147, 39 Atl. 898, 76 Am. St. 157; *Whitewell v. Winslow*, 134 Mass. 343; *Smith v. Sprague*, 119 Mich. 148, 77 N. W. 689, 75 Am. St. 384; *Urquhart v. Belloni*, 57 Ore. 314, 111 Pac. 692; *Brewster v. Striker*, 2 N. Y. 19; *Norton v. Coons*, 6 N. Y. 33; *Estis v. Jackson*, 111 N. C. 145, 16 S. E. 7, 32 Am. St. 784; *Cameron v. Cameron*, 95 Ala. 344; *Marsh v. Bridgeport*, 75 Conn. 495, 54 Atl. 196; *Chafey v. Mathews*, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558; *Tinsley v. Fruits*, 20 Ind. App. 534, 51 N. E. 111; *Farm Land Mortgage & Debenture Co. v. Hopkins*, 63 Kan. 678, 66 Pac. 1015; *Brian v. Bonvillain*, 111 La. 441, 35 South. 632; *Sanborn v. Van Duzen*, 90 Minn. 215, 96 N. W. 41; *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. 233, 66 Am. St. 679; *Jameson v. Rixey*, 94 Va. 342, 26 S. E. 861, 64 Am. St. 726; *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267;

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Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; *State v. Mellette*, 16 S. D. 297, 92 N. W. 395; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395, 62 Pac. 1024.

MORRIS, J.—In May, 1909, A. C. Rice, having obtained the contract for installing the electrical fixtures in the Federal building at Spokane, wrote to the Crown Electrical Manufacturing Company, at St. Charles, Illinois, requesting prices on certain fixtures. The Crown Electrical Manufacturing Company, replying to this letter, quoted prices to Mr. Rice, and on June 16, Rice wrote a letter to the Crown Electrical Manufacturing Company, accepting its offer, and a second letter inquiring as to the credit conditions, saying that he would make arrangements to have the account guaranteed by a local bank. This course being satisfactory to the Crown Electrical Manufacturing Company, Rice obtained a guarantee from the respondent, and wired the Crown Electrical Manufacturing Company to that effect, the respondent upon the same day wiring the Crown Electrical Manufacturing Company as follows:

“Spokane, Wash., 7-3-09.

“Crown Elec. Mfg. Co. We guarantee A. C. Rice bill two thousand dollars for Spokane Post-Office Elec. equipments.

“Northwestern Loan & Trust Co.”

Upon receipt of this telegram, the Crown Electrical Manufacturing Company wrote a letter to the respondent, part of which is as follows:

“We have your telegram stating you will guarantee A. C. Rice bill for two thousand dollars for the Spokane Post Office equipment. We would like you to confirm this, and also state that you are in a position where you can guarantee this so that it will be binding, as our understanding is that an ordinary bank guarantee is not good under the law, and of course, we wish this to be what it represents, a guarantee in fact. We have had trouble in Washington with the Oregon Trust & Savings Bank, under the same kind of a guarantee, in which the receiver has refused to pay when they

went into bankruptcy, and which we are now suing and consequently do not wish to get tied up in another deal of the same kind."

In response to this letter, the respondent wrote to the Crown Electrical Manufacturing Company partly as follows:

"Replying to your letter of July 6th, we beg leave to say that we do now confirm our telegram, and inasmuch as we have taken their note secured to cover any payments we might make up to \$2,000, we surely are in a position to guarantee the matter. Our ordinary telegraphic guarantee in the usual order of business is accepted by our New York correspondents and other banks, and we think your statement that an ordinary bank guarantee is not good under the law is perhaps too full a statement on your part. The wire or telegram that we sent you is a guarantee in fact."

About the same time, Rice wrote a letter to the Crown Electrical Manufacturing Company, part of which is as follows:

"In regards to bank guarantee will say that bank guaranteeing payment to you is controlled by the Gallands, who are wealthy brewers and property owners of this city. If you take time to look up Dun's reports you can readily satisfy yourself on this score. The bank here are themselves protected by a note of two thousand dollars, signed by N. E. Rice and F. E. Empey and myself. Mr. Empey, my brother-in-law, and N. E. Rice, my father, are worth in the neighborhood of \$100,000. So the bank is amply protected."

On July 2, F. E. Empey, N. E. Rice, and A. C. Rice executed and delivered to the respondent a note in the ordinary form for the sum of \$2,000. This is the note referred to in the letters of Rice and respondent, and the record shows that, as stated in the letters, it was given for the purpose of protecting the respondent against any loss that might come to it by reason of this guaranty. The account not having been paid, it passed into the hands of the appellant through due assignment, and this action was brought to recover the amount due, after the institution of suit against Rice and

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the obtaining of a judgment against him for \$1,724.10, and the return of execution unsatisfied. The court below dismissed this action, holding that the act of respondent in entering into the contract of guaranty was *ultra vires*.

The defense of *ultra vires* is one with which the courts have had much trouble in attempting to compel some corporations to live up to their contracts, and much has been said that is hard to reconcile. Many cases, among which may be classed those from this state, have refused to recognize this defense, where the contract has been fully executed and where in its performance one party has received and retained a benefit or the other has suffered a detriment and cannot be placed *in statu quo*. *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55; *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141.

In the last case, *Thomas v. Railroad Co.*, 101 U. S. 71, and *Parish v. Wheeler*, 22 N. Y. 494, were cited to the effect that executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. The statutes of this state, under which the respondent was organized and from which it derives its powers, give us no aid in determining the power of this corporation to enter into contracts of this character. They contain neither a grant of such power nor a prohibition against its exercise. At the time of the transaction here involved, Rice was a customer of respondent bank, and had been since the preceding October. Such fact was held, in *Farmers' & Merchants' Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136, to sustain a liability against the bank upon the ground that, in promising to honor the draft which was there sought to be enforced against it, the bank did so to secure business for one of its customers, in whose business it in turn had an interest and from which it hoped to derive

gain; and that, in extending and encouraging its customers' business, the bank, from a business standpoint, was promoting its own interest, and for that reason could not plead *ultra vires* as a defense. This holding is in line with those cases like *Tootle v. First Nat. Bank*, *supra*, which take the position that the receiving and retention of a benefit or the suffering of a detriment is sufficient to take away the defense of *ultra vires*.

Morse on Banks and Banking, § 740 (4), states as the rule that, where the excess of power is not a violation of the statute but of the common law, a bank will be liable on its *ultra vires* contract,

" . . . provided that either of the following combinations of facts exist: first, that the bank has received benefit from the transaction which it cannot or does not restore, . . . or, second, that the opposing party against whom the plea of *ultra vires* is hurled can show *both* that he had no notice actual or constructive that the contract was *ultra vires*, . . . and that he is a holder for value, or has parted with value or changed his condition disadvantageously by reason of the transaction."

In *Hagerstown Bank v. London Savings Fund Society*, 3 Grant's Cases (Pa.) 135, the supreme court of Pennsylvania held that, though the act of the bank was unauthorized and beyond its power, as between the bank and those who contracted with it, the unauthorized act would become a part of the usual and appropriate business of the bank, and it could not avoid liability. The following cases hold that, while generally a bank has no power to make a guaranty, it may do so for the protection of its own rights or as an incident to the transaction of its own business: *Ayer v. Hughes*, 87 S. C. 382, 69 S. E. 657; *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123; *People's Bank v. National Bank*, 101 U. S. 181; *Commercial Nat. Bank v. Pirie*, 82 Fed. 799; *Thomas v. City Nat. Bank of Hastings*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; *Mitchie, Banks and Banking*, 681. The last authority, at page 682, also lays

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down the rule that a bank may be estopped to deny its liability on a guaranty notwithstanding the contract was *ultra vires*, when the other party relied and acted thereon to his injury.

In *Hutchins v. Planters' Nat. Bank*, 129 N. C. 72, 38 S. E. 252, it was held, in ruling upon a demurrer to the complaint, that liability could be enforced against the bank upon its guaranty of a draft, basing such holding upon the following citations:

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." *Railway Co. v. McCarthy*, 96 U. S. 258.

"Although there may be a defect of power in the corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in execution of the contract, to accept money and perform his part thereof, the corporation is liable on the contract." *State Board of Agriculture v. Citizens' St. R. Co.*, 47 Ind. 407.

"Where a corporation has entered into a contract which has been fully executed on the other part and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of *ultra vires*." *Oil Creek & A. R. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. 160.

"Even if a contract is *ultra vires*, yet if it is not illegal the defendant is estopped from setting up that defense, as it would be a fraud upon the plaintiff to allow this to be done; he having entered into the transaction relying upon said contract." *Bushnell v. Chautauqua County Nat. Bank*, 10 Hun 378.

See, also, *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. Applying these principles to the facts of that case, the court added:

"It does not lie in the defendant's mouth to say that it had no authority to do what it did, after the plaintiff has shipped

his hides, relying upon the defendant's promise that the draft should be paid."

The lower court was seemingly of the opinion that the application of these principles would defeat the defense of *ultra vires* in case an ordinary commercial or industrial corporation should seek its protection, but that public policy demands a different rule when applied to a banking corporation. So far as public policy demands honesty and fair dealing on the part of corporations, we know of no reason why such a policy should include one class of corporations and exclude the other. Upon this line, respondent strongly pleads for protection to respondent's stockholders. It may well be doubted whether any injury can come to any innocent party by denying to respondent its plea. It has fortified itself against possible loss by demanding security for its indemnity in the \$2,000 note. It may safely be assumed that, before accepting this note, the bank well knew that it was a good note, collectible on condition broken, so that in fulfilling its contract the bank would work no hardship upon its stockholders or deprive them of assets in which they had the right to share. The respondent not only freely entered into this relation with the Crown Electrical Manufacturing Company, but, after the electrical company had indicated its misgivings as to the binding force of the guaranty and called attention to its understanding of the law and its resort to legal proceedings to enforce like contracts, respondent, seeking to allay this suspicion and to establish full reliance upon its good faith, wrote the letter of July 16, referring to the fact that it has secured itself with the \$2,000 note and that its guaranties are accepted by other banks and are to be received as "a guarantee in fact." Having lulled the electrical company into a position of financial security by referring to its protection against loss and affirming that its guaranty was without blemish of either law or fact, common honesty demands an enforcement of the contract. We have no hesitancy in holding that, upon the facts of this case, the defense

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of *ultra vires* is not available to the respondent. To hold otherwise, in the light of this record, would be to encourage fraud and bad faith, and to put the law in the position of awarding a premium to dishonesty.

The judgment is reversed.

CROW, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 11889. Department Two. August 14, 1914.]

HENRY D. BAYLOR, *Appellant*, v. W. H. TOLLIVER *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS—DESCRIPTION OF PROPERTY. A written contract to pay a broker's commission on a sale of real estate is void as within the statute of frauds, Rem. & Bal. Code, § 5289, where the property is described as "my property, including one hundred and twenty-one acres of land near Ephrata, and appurtenances, water right, water contract with the city of Ephrata, etc., etc.," since the description cannot be applied to any definite property without resort to parol testimony.

SAME—DESCRIPTION—SUFFICIENCY. A description of property, in a broker's contract of employment, is insufficient if it does not meet the requirements of a sufficient description under any other phase of the statute of frauds, as when invoked in actions for specific performance.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered October 28, 1913, dismissing an action on contract, after a trial before the court and a jury. Affirmed.

Bates, Peer & Peterson and *Daniel T. Cross*, for appellant.

William M. Clapp, for respondents.

MORRIS, J.—The lower court dismissed appellant's action to recover commissions for the sale of real estate under a written contract, upon the ground that the contract did not con-

¹Reported in 142 Pac. 678.

tain a sufficient description of the real estate to satisfy the statute of frauds, Rem. & Bal. Code, § 5289 (P. C. 203 § 3), providing that agreements employing agents to sell real estate for a commission shall be void unless the agreement, or some note or memorandum thereof, be in writing signed by the party charged.

The description in the contract is as follows: “. . . my property, including (121) one hundred and twenty-one acres of land near Ephrata, and appurtenances, water right, water contract with the city of Ephrata, etc. etc.” This description is insufficient, and the ruling of the lower court must be sustained, under the authority of *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660, and *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, and cases cited. It is clear that the description given in the contract cannot apply to any definite property without resorting to parol testimony. It was said in the *Cushing* case:

“Parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite piece of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description otherwise so incomplete as not to definitely describe any land. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described.”

Appellant accepts this test and contends that, inasmuch as Ephrata is a small country town of well-known location, any one conversant with property holdings in that vicinity could easily identify the Tolliver ranch of 121 acres, having water contract with the town of Ephrata. That may be accepted, but that is not the description in the contract. In reading a contract, every word must be given some meaning and interpreted as though used by the parties for a particular purpose indicating their meaning and intent. This description is not confined to the Tolliver 121 acres near Ephrata, but includes other property of unknown descrip-

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tion. The 121 acres is only a part of the property described. We cannot eliminate the words "my property including," and we have an incomplete description of the Tolliver property of which the 121 acres is only a part. What part? and, since "my property" includes 121 acres as a part, how many acres are included in the whole? No other meaning can be given to this language, without the aid of parol testimony, than that the property involved contained more than 121 acres, as the 121 acres is included as a part of the whole acreage. Again, what is meant by "etc. etc.?" The parties used that expression for some purpose. What purpose? Does it include property? If so, what property, and how is it to be determined except by parol testimony? "Etc. etc." means something or nothing. It would require parol testimony to determine which. No one could definitely determine the property included in this contract without first ascertaining the meaning of these expressions, in addition to ascertaining the meaning intended in the description "my property, including 121 acres."

Appellant contends that the correct rule is that the description is sufficient if it meets the requirements of a sufficient description under any other phase of the statute of frauds, as when invoked in actions for specific performance. We admit this to be the correct test, and as such it was laid down in the *Cushing* case. Under this phase of his argument, appellant contends that the description here is analogous to those contained in the following and other like cases where the descriptions are held sufficient: "The 'Byers place';" (*Ranney v. Byers*, 219 Pa. 332, 68 Atl. 971, 123 Am. St. 660). "We agree to purchase of H. his place at S. containing 15 acres more or less;" (*Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87). "A house and lot on Amity street, Lynn, Massachusetts;" (*Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671); "Our farm in LeClaire's reserve, Rock Island county, and consisting of 83.31 acres more or less;" (*Guyer v. Warren*, 175 Ill. 328, 51 N. E.

580.) In each of those cases, we find a description capable of definite ascertainment sufficient, with the aid of parol testimony, to identify the description with its location on the ground. In order to be apposite, those descriptions should read, "My property, including the Byers place, etc.;" "the property of H. including his place at S. containing 15 acres more or less, etc.;" "my property including a house and lot on Amity street, etc.;" "our property including our farm in LeClaire's reserve, etc." Or this description would have to read, "My farm at Ephrata containing 121 acres more or less." Whatever may be said of the sufficiency of this latter description, it is not the description in the contract, and we apprehend a different rule would have been announced in the cited cases had the descriptions there interpreted contained the additional words, "my property, including—— etc."

We, therefore, hold the description is insufficient to satisfy the statute, and the judgment is affirmed.

Crow, C. J., PARKER, and MOUNT, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11699. Department One. August 14, 1914.]

ALFRED SALIN, Appellant, v. L. ROY, Respondent.¹

FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSION—DESCRIPTION OF PROPERTY. A written contract to pay a broker's commission on a sale of real estate is void as within the statute of frauds, Rem. & Bal. Code, § 5289, where the property is described as "my timber and sawmill near Dupont . . . land, timber, mill and all," since the description is insufficient to determine the property included in the contract, without resort to parol testimony.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 22, 1913, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

McClure & McClure, for appellant.

Farrell, Kane & Stratton, for respondent.

CHADWICK, J.—On April 3, 1911, defendant made and delivered to plaintiff a writing in form as follows:

"Seattle, Wash. Apr. 3, 1911.

"In case of Alfred Salin furnishes a customer for my timber and sawmill near Dupont, Washington, and if said Salin can sell said property on terms which I accept, I will protect said Salin in any price he can obtain over \$10,500 for the land, timber, mill and all; or \$8,500 for the same property with the land reserved with five to ten years' privilege to cut the timber against paying taxes. I reserve the right to sell to others regardless of this agreement.

"L. Roy."

It is alleged in the complaint that plaintiff found a purchaser with whom the defendant consummated a sale of the timber and other property, reserving the land, for the sum of \$9,000, and asked for a judgment in the sum of \$500 as a commission, it being plaintiff's theory that he is entitled to all of the purchase price over and above the sum of \$8,500. The court sustained a demurrer to the complaint,

¹Reported in 142 Pac. 679.

holding that the contract was ambiguous and that it could not be explained without resort to parol testimony, and was, therefore, void under the statute of frauds, Rem. & Bal. Code, § 5289, subd. 5 (P. C. 203 § 3), as construed in *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 1030, *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660; and *Goodrich v. Rogers*, 75 Wash. 212, 134 Pac. 947, and the cases collected therein.

Since the cases relied on by the trial judge were decided, this court has had occasion to reaffirm its holdings with reference to what seems to us to be the principal point involved in this case. While it is probably true that the contract does not in terms provide for the payment of a commission without resort to oral testimony to explain the word "protect," we think the description of the property is insufficient, under the authority of *Baylor v. Tolliver*, ante p. 257, 142 Pac. 678. In that case, the property was described as "my property, including (121) one hundred and twenty-one acres of land near Ephrata, and appurtenances, water right, water contract with the city of Ephrata, etc. etc." It was contended that the description was sufficient within the rule announced in the *Cushing* case, but the court held that the word "including" and the etceteras created an ambiguity that could only be explained by the aid of oral testimony. In speaking of the abbreviation "etc. etc.," the court said:

"The parties used that expression for some purpose. What purpose? Does it include property? If so, what property, and how is it to be determined except by parol testimony? 'Etc. etc.' means something or nothing. It would require parol testimony to determine which. No one could definitely determine the property included in this contract without first ascertaining the meaning of these expressions, in addition to ascertaining the meaning intended in the description 'my property, including 121 acres.'"

In this case, the description is, "my timber and sawmill near Dupont . . . I will protect said Salin in any price he can obtain over \$10,500 for the land, timber, mill and

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all." It seems to us that the words "and all" are in legal effect the same, and are governed by the same rule of construction, as the words "etc. etc." in the case just cited. In fact, it seems that counsel must have appreciated this lack of legal sufficiency in the contract and has attempted to make it definite in his complaint where the property is described as "310 acres of timber land, located, lying and being in Section 2, Township 18, North of Range 1 East, Willamette Meridian, Pierce county, Washington, together with the engine, machinery, sawmill, supplies and other personal property located thereon." We can add nothing to the argument made by the court in the *Baylor* case. The judgment is affirmed.

Crow, C. J., Gose, MAIN, and Ellis, JJ., concur.

[No. 11551. Department One. August 14, 1914.]

E. REDDING *et al.*, *Appellants*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—PETITION AND ORDER—CONCLUSIVENESS. A petition for a local improvement not being a jurisdictional requirement, but one subject to waiver and which the legislature could have dispensed with, the legislature had power to provide, by 3 Rem. & Bal. Code, § 7892-19, that the action of the city council upon the sufficiency of the petition shall be final and conclusive.

SAME—IMPROVEMENTS—PETITION—SUFFICIENCY. Under 3 Rem. & Bal. Code, § 7892-9, authorizing a city council to pass upon the sufficiency of a petition by which an improvement is initiated, and Id., § 7892-19, making its action in all things conclusive, the passage of an ordinance ordering an improvement is, in effect, a finding that the petition was sufficient.

SAME—PROCEEDINGS—NOTICE—SUFFICIENCY—WAIVER BY APPEARANCE. An objection by property owners that a notice of hearing upon an assessment roll failed to conform to the statutory requirements is waived, where, in response to the notice, they presented their objections to the roll and were accorded a hearing thereon; since the purpose of the notice was thereby accomplished.

¹Reported in 142 Pac. 664.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 21, 1913, confirming an assessment roll, on appeal from the city council. Affirmed.

A. O. Colburn, for appellants.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant,
and *Dale D. Drain*, for respondent.

MAIN, J.—This is an appeal from a judgment of the superior court confirming an assessment roll. After the roll had been confirmed by the city council, and on the 20th day of May, 1913, the objecting property owners, who are the appellants here, appealed to the superior court. On the 28th day of May, a transcript of the files and proceedings by the city council relative to the improvement was filed with the clerk of the superior court for Spokane county, and notice given as required by law. On the 23d day of June, 1913, the cause was heard by the superior court. Thereafter, and on the 21st day of July succeeding, judgment was entered confirming the assessment roll, from which the present appeal is prosecuted.

No statement of facts or bill of exceptions has been brought to this court, in the absence of which, the only questions here for review are, first, Was the action of the city council upon the petition by which the improvement was initiated final and conclusive? and second, Was the notice given to the property owners to appear before the city council and present objections to the confirmation of the assessment roll sufficient?

I. By the local improvement code (Laws of 1911, chap. 98, p. 443, § 9; 3 Rem. & Bal. Code, § 7892-9) the city council is authorized to pass upon the sufficiency of the petition by which the improvement may have been initiated. By § 19 (Id., § 7892-19) the council may continue the hear-

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Opinion Per MAIN, J.

ing upon any petition and retain jurisdiction thereof until the same shall be finally disposed of, and "The action and decision of the council as to all matters passed upon by it in relation to any such petition or resolution shall be final and conclusive." In order to initiate a local improvement, a petition is not a jurisdictional requirement in the absolute sense. That is, it is a requirement which may be waived, and which the legislature could have dispensed with. *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010. Since the legislature might have authorized the improvement without requiring any petition, and it is a matter which is subject to waiver, the legislature had the power to make the action of the city council upon the sufficiency of the petition final and conclusive. 4 Dillon, Municipal Corp. (4th ed.), § 1454; *Scranton v. Germyn*, 156 Pa. St. 107, 27 Atl. 66. The action of the council in passing the ordinance ordering the improvement to be made is in effect a finding that the petition was sufficient. *Spaulding v. North San Francisco Homestead & R. Ass'n*, 87 Cal. 40, 24 Pac. 600, 25 Pac. 249; *German Sav. & Loan Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

II. After the assessment roll had been filed, notice was given to all persons who might desire to object thereto to present such objections. It is claimed that the notice was not a substantial compliance with the requirements of § 21 of the statute (Laws of 1911, p. 452; 3 Rem. & Bal. Code, § 7892-21). In response to the notice, however, the appellants presented their objections. The purpose of giving notice was thereby accomplished. The objections were brought before the city council and a hearing had upon the objections filed and presented. The object of giving notice to the property owner is to give him an opportunity to appear and protest. The objection that the notice did not exactly conform to the statute is unavailing if the objector is not prejudiced thereby. *North Yakima v. Scudder*, 41 Wash. 15, 82

Pac. 1022; *Tumwater v. Pix*, 15 Wash. 324, 46 Pac. 388; Smith, Modern Law of Corporations, § 1233.

The judgment will be affirmed.

Crow, C. J., Gose, ELLIS, and CHADWICK, JJ., concur.

[No. 11612. Department One. August 14, 1914.]

WASHINGTON MONUMENTAL & CUT STONE COMPANY,
Respondent, v. M. C. MURPHY *et al.*, *Appellants*.¹

CONTRACTS—BUILDING CONTRACTS—PERFORMANCE OR BREACH—CONSTRUCTION. An agreement "to recut all granite now on the building grounds that can possibly be used, and to furnish, cut and deliver on said building grounds all new Spokane granite that may be necessary to complete" certain steps, platforms, and granite courses shown by the plans, is plainly an agreement to recut only such granite then on the grounds as could be used for the purposes stated.

SAME—AMBIGUITY—CONSTRUCTION—"STEPS" AND "BUTTRESSES"—EVIDENCE—SUFFICIENCY. Where plans and specifications referred to in a subcontract for the stone work in a building provided for buttresses flanking the steps and platforms, the buttresses are not a part of the steps and the contract for cutting the granite for the "granite steps, platforms, and the two granite courses," does not include the cutting of granite for buttresses as well, where the contract was unambiguous in excluding all things not enumerated, and neither the contract nor the specifications contained anything that would tend to indicate that the word "steps" was used in a generic or technical sense, and the evidence failed to show any custom of builders that buttresses are to be considered a part of the steps and assumed to be made of the same material unless otherwise designated in the specifications; but, on the contrary, it was conclusively shown, by expert witnesses, that buttresses were usually made of the same material as the wall against which they abut, rather than of the material used in constructing the steps, and that a contract like the one in question would be construed as not including the cutting of granite for buttresses, and it was further shown that, at the time the plans and specifications were prepared and the contract let, it had not been fully decided that the buttresses should be of granite, there being evidence that an extra bid for cutting granite for the buttresses was subsequently requested.

¹Reported in 142 Pac. 665.

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MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTOR'S BONDS—ACTIONS—CONDITION PRECEDENT—NOTICE OF LIEN—TIME FOR FILING. The filing of a notice of lien by a subcontractor after completion of his work on a school building, but before formal acceptance by the school board of work under the general contract, is a compliance with Rem. & Bal. Code, § 1161, which fixes thirty days after acceptance as the limit beyond which an effective notice of claim cannot be filed against the contractor's bond; since the statute was intended to fix a limit beyond which the notice of claim cannot be filed, and not a limit before which its filing would be ineffectual.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered April 22, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Cannon, Ferris & Swan and *Samuel R. Stern*, for appellants.

Post, Avery & Higgins, for respondent.

ELLIS, J.—Action by a subcontractor against the principal contractor and his statutory bondsman, for work done by plaintiff upon a public building under its subcontract. On January 5, 1911, the defendant Murphy entered into a written contract with the city of Spokane School District No. 1, to erect a high school building in that city and furnish all the materials and labor therefor. An old school building on the same site had been destroyed by fire. It seems to be conceded that the general contractor had the right to use uninjured granite remaining on the ground in the construction of the new building. Pursuant to the statute, Rem. & Bal. Code, § 1159 *et seq.* (P. C. 309 § 98), the general contractor executed a bond, with the defendant Pacific Coast Casualty Company as surety, in an amount equal to the full contract price, conditioned, among other things, that the defendants would pay all laborers, mechanics, subcontractors and materialmen, and all just debts, dues and demands incurred in the performance of the work. The bond was delivered to the school board and filed with the auditor of Spokane county as

required by statute. On January 23, 1911, the plaintiff submitted to the defendant Murphy a bid for a subcontract for certain granite work, as follows:

"We will furnish, cut and deliver on building grounds, granite steps and platforms and the two granite courses around the building as shown for the sum of forty-eight hundred twelve dollars (\$4812). In this estimate we have figured on using all the granite, already on the ground, that can possibly be used. We also figure on using this rock face course just as it is, with the exception of putting on the returns and fitting."

On February 7, 1911, pursuant to this bid, Murphy and the plaintiff entered into a written contract, the portions of which material here are as follows:

"The party of the first part, [the plaintiff] agrees to recut all granite now on the building grounds that can be possibly used and to furnish, cut and deliver on said building grounds all new Spokane Granite that may be necessary to complete all granite steps, platforms, and the two granite courses as shown, as per plans and specifications of the New Central High School, of Spokane, for the sum of forty-eight hundred dollars (\$4800).

"In consideration of the fulfillment of the above the party of the second part [defendant Murphy] agrees to pay the party of the first part the above named sum of forty-eight hundred dollars—paying 85% on the tenth of each month, of the amount then cut and delivered on building grounds, and the final payment to be made in full within thirty days after the last stone has been delivered on the building grounds and accepted by the architect.

"Party of the second part also agrees to take down granite from the old walls and pile it in a suitable place so the granite cutters of the party of the first part can do the necessary cutting."

The plaintiff entered upon the work and completed cutting the granite for the two granite courses, the steps and platforms, in accordance with the terms of its contract. The plaintiff claims that this was all that its contract called for. The defendant Murphy claims that the contract included the

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cutting of granite for the buttresses as well. The school board, at a meeting held March 30, 1912, passed a resolution as follows:

"On motion of Mr. Long, it was voted to allow Mr. Murphy the balance on general contract on the Lewis & Clark High School up to 95% of the total amount, amounting to \$12,-270. And it was further voted to accept the building, as far as interior construction, as per recommendation of Architect Rand. . . ."

It is admitted that no further action was taken by the board, except that, on May 13, 1912, the board paid the defendant Murphy the balance due on his general contract. On June 10, 1912, the plaintiff filed with the school board his claim in statutory form against the bond for the unpaid balance of the contract price stated in his contract for cutting granite. The plaintiff also claimed a small item for extra work in recutting some of the granite, necessitated by an error of the defendant Murphy, and \$411 for cutting granite used in the buttresses flanking the steps.

At the conclusion of the evidence, the court made findings of fact and conclusions of law, which, in effect, sustained the plaintiff's contention that its contract did not contemplate buttresses as a part of the work; that it had substantially performed its contract, and was entitled to the balance of the contract price, and to pay for the additional work except that done on granite for the buttresses. Judgment was entered against the defendants in the sum of \$1,251.03, and costs, from which they prosecute this appeal.

Both of the appellants insist that the judgment should be reversed because the evidence failed to show that the respondent had fully performed its contract. The casualty company insists, that, in any event, the action should be dismissed as to it, because there had been no formal acceptance of the exterior work on the school building by the school board at the time the respondent filed its claim against the bond.

I. The appellants' argument under the first head is two-fold. It is first asserted that, by the terms of its contract, the respondent agreed "to recut all granite now on the building grounds that can possibly be used." It is said that it has not done this, hence has not completed its contract. This fragment is lifted bodily from the sentence of which it forms a part, without even so much as a separation by comma, much less by period. Taken in context, this language was clearly intended to evidence an agreement to recut only such granite then on the grounds as could be used for the purposes set out in the remainder of the same sentence with which it is used in the conjunctive, "and to furnish, cut and deliver on said building grounds all new Spokane granite that may be necessary to complete all granite steps, platforms and the two granite courses as shown, as per plans and specifications," etc. The obvious purpose of requiring the use of all old granite possible was to minimize the cost to the subcontractor. This phase of the argument hardly merits further notice.

It is next urged that, inasmuch as the plans and specifications referred to in the contract provided for buttresses flanking the steps and platforms, the buttresses are a part of the steps and therefore the contract included the cutting of the granite for these as well as for the "granite steps, platforms and the two granite courses." Here again the conclusion comes perilously near being abortive for lack of sufficient premises. The contract itself would hardly seem ambiguous, since, by particularizing the things included: steps, platforms, and courses, it excluded all things not enumerated. If the word "steps" was used in some broad generic sense, as including everything in any way related to the steps proper, so as to include the buttresses, why use the word "platforms" at all? They, at least, are in a sense steps, while the buttresses are not. It is a matter of common knowledge that a platform in a stairway is, both in use and position, but a broader step or tread. A buttress, though sometimes employed as a balustrade, would hardly perform the office of a step in any connec-

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tion. Nor is it clear that any ambiguity was imported into the contract by its reference to the plans and specifications. An examination of the plans of the school building shows the words "granite steps" with an arrow pointing to the steps alone, i. e., the treads. The lower base course is marked "fine axed granite" and the upper course is marked "stone." A front cross section shows the legend, immediately below the upper course (which is referred to in evidence as the base mold), and above the buttress, "all work below base mold to be of stone." Even the sheet showing the details for the buttresses, steps, and platforms fails to show that the buttresses are to be of granite. The steps and platforms are shaded in such a way as to indicate that it was the original intention that they should be made of a different material from the buttresses. There is nothing whatever, either in the written plans or in the specifications, which would tend to indicate that where the word "steps" is used in the contract it should be construed in a generic or technical sense. The trial court was, however, of the opinion that, in the light of the specifications, the contract was ambiguous, and admitted parol testimony for the purpose of construing it. This testimony signally failed to sustain the appellants' construction. The testimony on behalf of the appellants was directed to an effort to prove that it is not usual to designate steps and buttresses separately in making or receiving bids; that, where the specifications call for buttresses, steps would not be considered complete without buttresses, and that it is usual for the buttresses to be made of the same material as the steps, rather than of the same material as the wall against which they abut.

The appellant Murphy testified to all these things; but, after stating that the buttresses are a part of the steps, he also said that the steps are a part of the buttresses, thus negating the idea that either term is generally regarded as a generic term including the other where only one is used. His superintendent on this work also testified to most of these things, but finally admitted that ordinarily the buttresses are

made of the same material as the wall against which they abut even where the steps are of different material, thus negating the idea that a bid to cut stone for steps would ordinarily include cutting stone for buttresses. He also testified that the bid in this case, as he understands it, "refers to and includes the buttresses," because he never heard any one say that the buttresses were to be of anything but granite; clearly a mere conclusion, not founded either on the bid itself, the contract, or the specifications. When asked to show where the specifications called for granite buttresses, he merely pointed out the fact that the base course which runs all round the building was marked "fine axed granite" and ran through the buttresses.

The architect on the building also testified that, when the plans call for buttresses, the steps are not considered complete without them; that it was intended all along to use granite for the buttresses on this building; that in making and receiving bids, it is not usual to designate steps and buttresses separately unless they are to be made of different materials, and that it is usual for the buttresses to be constructed of the same material as the steps. He finally admitted, however, that whether a buttress shall be of the same material as the steps or of the same material as the wall of the building against which it abuts is, in each instance, "just as the architect decides what he wants," thus negating the idea of any such general custom as that which his testimony was offered to establish. He also testified that, in this case the material of which the buttresses were to be made was not indicated on the plans and specifications; that it should have been, but was overlooked. None of these witnesses, save the architect, could recall a single building the buttresses of which are not of the same material as the wall though the steps are of different material. He instanced the Spokane county court house as an example, but it transpired that he was mistaken. He testified that he told all bidders that the buttresses in this case were to be of granite, but admitted that he spoke to the respond-

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ent's president about it between the middle of April and August, 1911, some months after the respondent's bid was made and the contract entered into. It will thus be seen that, even considering the appellants' evidence alone, no custom of builders was established that buttresses are usually considered a part of the steps and assumed to be made of the same material unless differently designated in the specifications, so that one bidding to cut stone for steps would expect to be required to cut stone for buttresses also. In short, even with the aid of parol evidence, the appellants wholly failed to import into the contract any ambiguity as to what the bid and contract reasonably contemplated.

We deem it unnecessary to discuss the evidence introduced in behalf of the respondent on this subject further than to say that several expert witnesses, contractors of long experience, testified to the effect that it is much more usual for buttresses to be of the same material as the wall against which they abut than of the same material as the steps which they border, and that a contract calling for the cutting and delivery of all granite, "that may be necessary to complete all granite steps, platforms, and two granite courses as shown as per plans and specifications," in the light of plans and specifications such as found in this case, would be construed as not including the cutting of granite for buttresses. Taken as a whole, the evidence seems to us overwhelming in this particular. Some ten photographs of entrances to different public buildings, office buildings, school buildings, churches, apartments, etc., in the city of Spokane, all showed the buttresses made of different material from that of the steps and, in every instance, of the same material as the wall of the building. There was also evidence strongly tending to show that, at the time the plans and specifications were prepared and the contract let to the respondent, it had not been fully decided that the buttresses should be of granite.

The respondent's president testified that, about June 20, 1911, he had a conversation with the appellant Murphy, who

then asked him to put in an additional bid for the buttresses; that he prepared a bid of \$1,192 for that work, and handed it to Murphy, who read it, put it in his pocket, and said, "I will let you know later;" that afterwards, respondent began cutting stone for the buttresses under direction by 'phone from Murphy's office, assuming therefrom that its second bid was accepted; that when, afterwards, Murphy refused to enter into a contract for the buttresses, the respondent ceased work thereon. The appellant Murphy denied this, but only in a qualified way. The respondent included in its complaint \$411 for this work, which the court did not allow. Upon the whole record, we are persuaded that the judgment of the court was perhaps more favorable to the appellants than, under the evidence, they had the right to expect.

II. It is admitted that there had been no formal acceptance of the exterior work on the school building by the school board when the respondent filed its claim against the contractor's bond. The court found, however, that on May 13, 1912, the work was fully performed and accepted by the school district, and that the respondent's claim was filed within thirty days thereafter. This was based upon the admitted fact that final payment on the general contract was made on May 13, implying a final acceptance of the work. We find it unnecessary to decide that this was such an acceptance as contemplated by the statute, Rem. & Bal. Code, § 1161 (P. C. 309 § 97), in order to sustain this judgment. The statute which fixes thirty days after acceptance as the limit beyond which an effective notice cannot be filed, was never intended to declare invalid a notice filed by a subcontractor after the completion of his own work but before the final acceptance of the general contract as completed. The statute was intended to fix a limit beyond which the notice of claim cannot be filed, not to fix a limit before which its filing would be ineffectual. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158. The purpose of the statute was fully met by the respondent when, after completion of its own contract, it filed

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its claim at a time short of thirty days after acceptance of the whole work covered by the general contract, whether the final payment by the school district be regarded as equivalent to a formal acceptance or not. There is nothing in our recent decision in the case of *Wheeler, Osgood Co. v. Fidelity & Deposit Co.*, 78 Wash. 328, 139 Pac. 53, contrary to the view here expressed. We there held that a claim presented more than thirty days after acceptance of the building by the architect was too late, which is, of course, a very different thing from holding that presenting the claim before a formal acceptance would be too early to be effective under the statute.

The judgment is affirmed.

CROW, C. J., CHADWICK, MAIN, and GOSE, J.J., concur.

[No. 11307. Department One. August 15, 1914]

THE STATE OF WASHINGTON, *on the Relation of Great Northern Railway Company, Appellant, v. PUBLIC SERVICE COMMISSION, Respondent.*¹

RAILROADS—REGULATION—TRAIN SERVICE—ORDERS OF PUBLIC SERVICE COMMISSION—REVIEW. The reasonableness and lawfulness of an order of the public service commission respecting train service to be rendered a town is reviewable under Rem. & Bal. Code, § 8629, and the presumption that the commission acted reasonably and lawfully must be clearly overthrown before the order will be set aside.

SAME—INTERSTATE TRAINS—LOCAL SERVICE. Although a railroad company operates only interstate trains, it may be required by the public service commission to render an adequate local service for the accommodation of the traveling public.

SAME—ADEQUACY OF TRAIN SERVICE—EVIDENCE—SUFFICIENCY. A finding by the public service commission that train service furnished the town of K. was inadequate, and that a change of schedule would be to the advantage of the inhabitants thereof, is warranted by the evidence, where it was shown that there was a population of 1,500 people within a radius of nine miles, who, for the most part, transacted their business at K., that there were four jury terms of court

¹Reported in 142 Pac. 684.

at the county seat thirty miles west of K., and that the service ordered would best serve the convenience of those attending court, and would enable them to travel west to the county seat, or east to Spokane to transact business, and return the same day, that the passenger revenue at K. for the preceding year was \$4,311.65, and the revenue from freight over five times that amount; and the fact that compliance with the order might require an extra man, and that the train would be delayed from six to nine minutes, is not controlling upon the question of the adequacy of service.

Appeal from a judgment of the superior court for Thurston county, Yakey, J., entered December 20, 1912, affirming on appeal an order of the public service commission. Affirmed.

F. V. Brown and *F. G. Dorety*, for appellant.

The Attorney General and *Stephen V. Carey*, Assistant, for respondent.

GOSE, J.—This is an appeal from a judgment affirming an order of the public service commission, requiring the appellant, Great Northern Railway Company, to change its train schedule at the town of Krupp, in Grant county.

Krupp has a population of from two hundred and fifty to three hundred people. It is situate about thirty miles easterly of Ephrata, the county seat of Grant county. The appellant's line of road passes through both towns. At the time of the hearing before the commission, the following trains stopped at Krupp to receive and discharge passengers: "Eastbound, No. 44, 8:35 a. m.; eastbound, No. 4, 6:37 p. m.; westbound, No. 43, 11:40 a. m." The commission found that the stopping of westbound train No. 43 at Krupp might be discontinued, and that westbound train No. 3, arriving at Krupp at 10:43 p. m., should be stopped daily at that point. The commission found that this change in schedule would, for various reasons, furnish the people of Krupp and vicinity with better traveling accommodations.

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The "reasonableness and lawfulness" of the order may be reviewed by the courts. Rem. & Bal. Code, § 8629. The presumption is that the commission has acted reasonably and lawfully. "It must clearly appear to the contrary before its orders can be set aside." *State ex rel. Great Northern R. Co. v. Railroad Commission*, 60 Wash. 218, 110 Pac. 1075.

The appellant runs no local train. Its trains are all interstate trains. These trains may be required to render an adequate local service for the accommodation of the traveling public. *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135; *Mississippi Railroad Commission v. Illinois Cent. R. Co.*, 203 U. S. 335.

The question presented is one of fact. The testimony shows that the stopping of westbound train No. 3 at Krupp, in lieu of westbound train No. 48, will be to the advantage of the inhabitants of that town and vicinity. There is a population of approximately 1,500 people within a radius of nine miles from Krupp. These people, for the most part, do their business at Krupp. There are three to four jury terms of court held at Ephrata each year. The testimony shows that train No. 3 will best serve the convenience of jurors, witnesses, and litigants who attend court from Krupp and vicinity. It will also enable the people to go west to Ephrata or east to Spokane, transact their ordinary business, and return the same day. The passenger revenue at Krupp for the year preceding the filing of the complaint was \$4,311.65. The revenue derived from freight for the eleven months preceding the same date was \$22,512.08.

On the other side of the question, the appellant showed that a compliance with the order *may* require an extra man, and that the train will be delayed from six to nine minutes. While these elements are to be considered, they are not controlling. "Because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result." *Atlantic Coast Line R.*

Co. v. North Carolina Corporation Commission, 206 U. S. 1. This principle was reaffirmed, in *Missouri Pac. R. Co. v. Kansas ex rel. Railroad Com'rs*, 216 U. S. 262.

It is also suggested in the testimony that there are other small towns between Krupp and Spokane at which westbound train No. 3 does not stop, which merit the same accommodations as Krupp. The adequacy of the service now rendered at these points is not before us, nor are there sufficient data in the record to justify a consideration of such questions. As was suggested in *State ex rel. Great Northern R. Co. v. Railroad Commission, supra*, it will be time enough to consider the adequacy of the service at these stations, and the relation of the question to other stations and to the company, when the questions are presented. The evidence warranted the commission in concluding that the westbound service at Krupp was inadequate. While it would also have justified an opposite finding, we cannot say that the finding is unreasonable.

The judgment is therefore affirmed.

CROW, C. J., and ELLIS, J., concur.

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[No. 11773. Department One. August 15, 1914.]

F. D. BLACK *et al.*, *Plaintiffs*, v. HENDRICK SUYDAM *et al.*,
Defendants.

WILLIAM P. TRIMBLE *et al.*, *Appellants*, v. GEORGE E.
WRIGHT, *as Executor etc.*, *Respondents*.¹

MORTGAGES — FORECLOSURE — SALE IN PARCELS — POWER OF COURT. Rem. & Bal. Code, §§ 583 and 587, relating to sales of property on execution, and providing that the sheriff shall offer the land for sale as an entirety or in parcels as he shall deem the most advantageous, and that when the property consists of several known lots or parcels they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion is claimed by a third person and he requires it sold separately, such portion shall be sold separately, do not abrogate the equitable power of the court to order a sale in parcels, and in the inverse order of alienation, on the foreclosure of a mortgage covering the entire tract, part of which had been conveyed by the mortgagor to a third party, where the equities of the parties will be subserved thereby, and without impairing the security of the mortgagee.

APPEAL — REVIEW — ERROR INVITED BY APPELLANT. In an action to foreclose a mortgage, error of the court, if any, in refusing to try out the question of priority of title as between defendants to a part of the mortgaged property, claimed under a contract of purchase executed prior to conveyance by the mortgagor of the entire property to the other defendant, cannot be claimed where appellants objected to trying out the question of priority and demanded a decree which would assume their own priority, thereby inviting the error complained of.

APPEAL — REVIEW — ESTOPPEL TO ALLEGE ERROR — ADMISSIONS. Where, in an action to foreclose a mortgage, the question of the priority of title to part of the mortgaged property was in issue between defendants, the appellants are estopped to claim that admissions of counsel relating thereto were inadvertently made by counsel in the course of the trial and not intended to be binding, where the court had asked for a statement of the position they intended to occupy, and later recapitulated what he conceived to have been admitted, stating that his decree would be based thereon, and on appealing to counsel to state whether any dispute existed as to the facts as recited, was told that they were correct.

¹Reported in 142 Pac. 700.

MORTGAGES—FORECLOSURE—SALE IN PARCELS—PRIORITY OF ADVERSE CLAIMS—ADMISSIONS. Where mortgagees disclaim any interest in the manner of sale, it is proper, without trying the title, to direct a sale of nine acres of the tract, claimed by one of the defendants under a contract of purchase with the mortgagor prior to the mortgagor's conveyance of the entire tract to the other defendant; since it was the duty of the court to preserve the *status quo* of the parties until the question of priority could be litigated, and no injury would result from the sale.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 6, 1918, upon findings in favor of the plaintiff, in an action for the foreclosure of a mortgage, after decreeing a sale in parcels, upon the trial of an issue between defendants. Affirmed.

France & Helsell and *John W. Roberts*, for appellants.

Wright, Kelleher & Caldwell and *Lane Summers*, for respondents.

ELLIS, J.—This is an action to foreclose a mortgage, given by the defendant Suydam to Stevenson-Sanders Land Company, covering forty acres of land, and by that company assigned to the plaintiffs. The plaintiffs asked a personal judgment against the defendant Denny as guarantor. The mortgage was not contested by any of the defendants. Trimble and wife answered, admitting the mortgage and its priority, and claiming ownership of the entire forty-acre tract.

Wright, as executor and trustee of the estate of W. Hammond Wright, deceased, answered, claiming a contract of purchase for a specifically described nine acres of the forty, and alleging that his contract of purchase antedated the mortgage. He also alleged that he had commenced an action in the superior court of King county in which the court had decreed that a conveyance be made to him, as executor and trustee, of the nine-acre tract described in his contract. He prayed that it be provided in any decree foreclosing the mortgage that the portion of the

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mortgaged premises not covered by his contract be first sold to satisfy the mortgage indebtedness, and that, after the sale of such portion, if any balance of the mortgage indebtedness remain unpaid, then the portion of the mortgaged premises covered by his contract be last so sold to satisfy such remaining indebtedness.

To this answer, the Trimbles replied, denying any priority on the part of Wright, reaffirming Trimble's purchase of the entire forty acres, admitting the entry of a decree for a conveyance of the nine acres to Wright, as pleaded in Wright's answer, and alleging that an appeal had been prosecuted from that decree to the supreme court, which appeal they alleged was still pending. The other defendants appeared and denied the allegation of the complaint that Denny was a guarantor, and disclaimed all interest in the premises.

The trial was had on March 5, 1913. The whole contest was waged on the issue between Wright and the Trimbles as to whether a sale should be made in separate tracts, as prayed for in Wright's answer, or of the whole forty acres as an entirety, as urged by the Trimbles. The plaintiffs interposed no objection to a sale in parcels, disclaiming any preference in the matter. The court, at the time of this hearing, was of the opinion that the right of the defendant Wright, if he had any, to a separate sale of the land claimed by him could be preserved by a demand on the sheriff at the sale that the nine acres claimed by him be sold separately and last. It appears that findings were prepared on this theory, but were never signed by the court nor filed in the action.

On May 27, 1913, a second argument was had, upon the application of the defendant Wright to open the proceedings and take evidence as to his priority over the Trimbles touching the nine-acre tract, to the end that a decree might be entered directing a sale of that tract separately and last. The court, recalling certain admissions which had been made by counsel for the defendants Trimble, at the first hearing,

changed his ruling and decided that the sale should be made in accordance with the prayer of Wright's answer, namely, in two parts; that not included in Wright's contract first, and that included in Wright's contract only in case the balance of the land failed to bring sufficient to satisfy the mortgage indebtedness. The court, both at the original trial on March 5, and on the second argument of May 27, refused to try out the question of title as between Wright and Trimble, and based his final ruling of May 27 on the admissions of counsel for Trimble, which we shall notice in the discussion of the case.

On June 6, 1913, when findings in accordance with the oral decision of the court of May 27 were presented, the defendants Trimble again objected to a sale in parcels, and insisted that the court could not so decree without fully trying out the title as between Wright and Trimble. Prior to that, at both hearings, the defendants Trimble had insisted that the court had no power in the foreclosure action to try the issue between Wright and Trimble, and the court had adopted their view. The defendant Wright, throughout the proceedings, insisted on a hearing on the question of priority. After a full argument, on June 6, 1913, the court finally refused to make any formal findings of fact, but signed and entered a decree ordering a sale in parcels according to his oral decision of May 27. The defendants Trimble appealed.

If we have caught the position of the appellants correctly, it rests upon two principal contentions: (1) that the court had no power to order a sale in separate parcels, as that is a matter which is referred by the statute to the discretion of the sheriff when making the sale; (2) that, in any event, the court erred in ordering a sale in separate tracts, the Wright tract last, without any evidence that Wright's interest, if he had any, was prior to that of Trimble.

I. The rule of equity in such cases, in the absence of contravening statutes, is tersely expressed as follows:

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"Where it is necessary, in order to do equity as between several encumbrancers, or between successive purchasers of the mortgaged land or parts of it, that the different portions should be put up for sale in a certain order, as, in the inverse order of their alienation, the foreclosure decree should so command, with specific directions as to the order of sale, provided the existence of such equities is brought to the attention of the court by proper allegations in the pleadings, or facts shown at the hearing, or by the prayer of the party whose advantage will be promoted by a particular order of sale." 27 Cyc. 1652.

"But questions as to priority of claims upon different portions of the premises should be settled by the court before a sale is made, rather than after the sale, as the parties interested are then able to act intelligently as to the bidding at the sale, and the officer selling can directly afterwards go on with the distribution of the proceeds." 2 Jones, Mortgages (6th ed.), § 1611, p. 552.

As sustaining their contention that the equitable power of the court to order a sale in parcels where the mortgage covers the entire tract is abrogated by statute, the appellants cite Rem. & Bal. Code, § 587 (P. C. 81 § 909), which directs the manner of sale on execution by the sheriff as follows:

"He shall then offer the land for sale, the lots and parcels separately or together, as he shall deem most advantageous. All land, except town lots, shall be sold by the acre."

It is argued that, under this statute, it is, in all cases, the duty of the sheriff, and not of the court, to determine whether the sale shall be made in parcels or by the entirety. This court, in *Solicitors Loan & Trust Co. v. Washington & Idaho R. Co.*, 11 Wash. 684, 40 Pac. 344, has held that, where the rights of a purchaser of a part of mortgaged property are concerned, the above quoted statute is not controlling upon the court, and that, in such a case, it is the duty of the court, when it can be done without impairing the security of the mortgagee, to direct a sale of the land remaining to the mortgagor prior to the sale of the portion conveyed away by him. After discussing the above quoted section, and after

quoting from the code of procedure, § 501 (Rem. & Bal. Code, § 583; P. C. 81 § 927), as follows:

“When the sale is of real property consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately,”

the court said:

“It will be seen by an examination of these several sections of the code that none of them contains anything inconsistent with the equitable rule contended for by appellant. They refer generally, so far as foreclosure proceedings are concerned, to sales where no part of the mortgaged property has been alienated. In fact, § 501 [Rem. & Bal. Code, § 583] seems to recognize the right of one claiming a portion of the property which is to be sold to have his part sold separately. We think the appellant was justly entitled to an order directing the sheriff to sell, according to law, all of the mortgaged premises remaining to the mortgagors, before offering for sale that portion conveyed to and owned by appellant.”

The appellants contend that this court has held that Rem. & Bal. Code, § 583 (P. C. 81 § 927), above quoted, applies only to persons claiming adversely to the *mortgagor* and *mortgagee*. They quote, as sustaining that contention, the following language from *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848, “We are of the opinion that the third persons here referred to are such persons as claim adversely to the mortgagor and mortgagee.” In order to support their argument, they have cut a sentence of the opinion in that case in two, at a comma, and substituted a period for the court’s punctuation. The whole sentence, as found in that opinion, reads as follows:

“We are of the opinion that the third persons here referred to are such persons as claim adversely to the mortgagor and mortgagee, and such as acquire interests in the mortgaged property after the mortgage but before action is brought to foreclose.”

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It will thus be seen that the court adds, in clear phrase, which we have italicized, other third persons than those claiming adversely to the mortgagor and mortgagee, namely, those who have acquired a subsequent interest, but prior to the action to foreclose. This would include the respondent Wright in this instance. In the *Fairhaven Land Co.* case, the rule did not apply, because the claimants had purchased *pendente lite*, and after the notice of sale had been actually published.

The rule is established by overwhelming authority that, on foreclosure of a mortgage covering an entire tract, parts of which have been conveyed by the mortgagor to third persons subsequent to the mortgage but prior to the action to foreclose, the court will, when that fact appears, either in the pleadings, by the admissions of the parties, or by evidence, order a sale in parcels in the inverse order of alienation, when it appears that that course will best subserve the interests of all concerned.

"Upon a sale of mortgaged premises in an action for foreclosure, if the mortgagor, subsequent to the execution of the mortgage, has made successive transfers of separate parcels of the mortgaged premises to different persons, that portion, if any, still remaining in his hands, must first be sold to satisfy the mortgage debt and the costs and expenses of the action; and if a sufficient sum for that purpose is not realized from such sale, then the various portions of the mortgaged lands conveyed by the mortgagor must be sold in the inverse order of their alienation, according to the equitable rights of the different grantees as among themselves, until a sufficient sum is realized to satisfy the mortgage debt . . . This rule has been adopted throughout the states of the Union, and now prevails in New York, Alabama, Colorado, Florida, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Vermont, Virginia, and Wisconsin. The same rule also prevails in England, but a different rule obtains in Iowa, Kentucky and Georgia." 1 Wiltsie, Mortgage Foreclosure (3d ed.), § 584.

"The rule providing for the sale of parcels of mortgaged premises in the inverse order in which the conveyances thereof were made has been said to rest upon the principle that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser, that the part still held by the mortgagor should first be applied to the payment of the debt The portion of the mortgaged premises retained by the mortgagor being regarded as equitably charged with the payment of the debt, if the mortgagor afterwards sells another parcel thereof, the second purchaser will take his parcel charged with the payment of the mortgage debt, as between him and the purchaser of the first lot; but as between such second purchaser and his vendor, the land still retained by the mortgagor will be primarily liable for the payment of the whole debt. The same principle will apply to every successive alienation throughout the entire order thereof." 1 Wiltsie, Mortgage Foreclosure (3d ed.), § 591.

See, also, 2 Jones, Mortgages (6th ed.), § 1621; 27 Cyc. 1368. We now declare in terms what was plainly implied in *Solicitors Loan & Trust Co. v. Washington & Idaho R. Co.*, *supra*. There is nothing in our statute preventing the application of the general equitable rule that it is the duty of the court to order a sale in parcels and in the inverse order of alienation when the equities of all parties will be subserved thereby, and when it can be done without impairing the security of the mortgagee. We have never held to the contrary. Here the mortgagee is not objecting to the application of that rule. Nor does it appear that a sale in parcels will realize a less price than a sale in the entirety.

II. If the court committed any error in refusing to try out the question of priority of title as to the nine-acre tract between Wright and the Trimbles, that error was invited by appellants. Wright, throughout, insisted upon offering evidence as to his priority of title over Trimble, and finally induced the court to permit him to put in evidence his contract with Suydam. While it would have been proper for the court to have taken evidence touching the question of prior-

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ity between the parties to this appeal, we are of the opinion that, in view of the admissions made by the appellants Trimble at the original hearing of March 5, 1913, and again on the second argument of May 27, it was unnecessary. At the original hearing, the following colloquy took place between the court and counsel for the appellants Trimble:

"The Court: I never understood there was any dispute about the ownership of the parcels of land. I did not know there was any differences. I will hear from counsel. I had supposed there was no dispute about the ownership of the separate parcels.

"Mr. France: No, if your honor pleases. Mr. Suydam had an optional contract with the Stevenson-Sanders Land Company for forty acres of land and while he had that option, he agreed in another option to let Mr. Hammond Wright, now represented as executor, have an option for ten acres of that land. That option, according to our theory, was never exercised and expired by limitation and was cancelled and that is a question that has been twice to the supreme court and it is now set down in the supreme court for hearing some time in May. Subsequent to the expiration of the option to Mr. Wright, Mr. Suydam assigned his original option of forty acres to Mr. Trimble, and, subsequent to that time, gave a warranty deed to Mr. Trimble and Mr. Trimble now holds the legal title to the whole forty acres, subject to this optional right of Mr. Wright."

On the second argument of May 27, after a lengthy discussion, in which the respondent Wright was insisting upon opening the case for the admission of testimony as to his priority, the following took place:

"The Court: Let the stenographer take this down as a part of the record to be transmitted to the supreme court in the event of an appeal:

"The court will regard the case as reopened at this time for the purpose of considering conceded facts that may not have been in evidence before the court at the trial, and the court will pass upon this question at this time in the light of the evidence at the time of the trial and of the conceded facts affecting the title to this property as now conceded in

open court. I will not open the case for the purpose of hearing the evidence regarding any disputed question of fact.

"It appears from the whole record, without any controversy, that one Suydam was the owner of the forty acres of land described in the complaint; that while the owner of the whole property he made a contract with one Wright for the sale of a specific nine acres, which contract was at once put on record; thereafter Suydam executed to the plaintiff in the case, as security for a loan, a mortgage covering the entire forty acres; thereafter Suydam executed to the defendant Trimble not [now] before the court in this action, and being for the first time before the court with reference to any claim he might have, or any interest in this property, a deed covering the whole of the forty acres which would purport to convey to Trimble title to the nine acres which Suydam had previously conveyed to Wright. After the execution of the deed from Suydam to Trimble, Wright brought an action against Suydam for the specific performance of the contract for the conveyance to Wright by Suydam of the nine acres in question. Judgment was rendered by the trial court in favor of the plaintiff and an appeal taken from that judgment to the supreme court, and the lower court was recently affirmed, so that at this time as between Suydam and Wright the latter has been adjudicated to be the owner of this tract of nine acres. Trimble not having been a party to the specific performance suit is not concluded by that decree and any ruling made by the court at this time upon the present issue would be without prejudice to the claim of Trimble or to the claim of Wright, leaving the controversy between them with regard to this tract of nine acres open to future litigation. I do not regard it as necessary for the court in this mortgage foreclosure to try a question of title between the conflicting claimants, and I do not undertake to do so. Such litigation is foreign to the purpose of the foreclosure suit.

"Now if it should transpire as the result of future litigation between Trimble and Wright that the latter as against Trimble is the owner of this tract of nine acres, certainly the sale of the whole forty acres in lump under the decree of foreclosure in this case would work to the disadvantage and loss of Wright. If the sheriff should refuse to sell his nine acres separately he would be unable to redeem his nine acres notwithstanding he has paid for it and depositing the money

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into the registry of this court under the order of this court, unless he redeem the entire tract of forty acres from the sale. Such redemption might well be impossible in view of the money involved.

"Now, without passing at all upon the question of the right of Trimble against Wright and leaving that entirely open for future litigation, it seems to me that it would preserve the existing status and protect the ultimate rights, as may hereafter be determined by the court, that there should be a sale—a separate sale of this parcel. In the event that Wright should prevail in any litigation with Trimble he would then be able to redeem this nine acres by paying to the sheriff the price paid for that particular parcel. I do not see how the defendant Trimble could be prejudiced in any way by such a sale in parcel. At the time of the trial I was under the impression that the sheriff would naturally and presumably perform his duty by making a sale in parcel on the demand of Wright, and for that reason it seemed to me unnecessary to incorporate such a direction in the decree, but counsel tells me that the practice of the sheriff where the order is not specific is to sell the land in lump, and regardless of the practice. It would seem from the decision of the supreme court, reported in the 11th Washington in the suit of *Solicitors Loan & Trust Company v. Washington & Idaho Railroad Company*, that where there is an interest, an established interest, under a deed of property covered by a mortgage, that the grantee of the part has a right to a decree of the court requiring the sale of that part separately, so that the purchaser of it may redeem it separately. For the reasons as stated by the court, I will direct the separate sale of this property, the sale of thirty-one acres to be first, and the sale of nine acres second, without passing at all upon the rights between Trimble and Wright.

"Mr. France: In view of the decision of the court, it seems to me that new findings should be prepared in accordance with the present decision.

"The Court: I don't understand there was any dispute about the facts as recited by the court.

"Mr. France: I think the facts recited by the court are in accord with the court's statement that he would decide this

upon the undisputed facts, but those are not the facts that are recited in the proposed findings.

"The Court: I don't see any occasion to worry the court with these findings. Let what I have said go in the record and go before the supreme court. They will understand my ruling and I think a decree simply directing the order of sale will be ample."

From the position thus outlined, the court never receded. It is true that, on the argument of June 6, another of counsel for appellants insisted that nothing was or had been admitted, but the above speaks for itself. It is urged that these admissions were inadvertent admissions made by counsel in the course of the trial, and not intended to bind the appellants Trimble in any way; but, in view of the fact that in both instances the court had directly appealed to counsel for a statement as to the position they intended to occupy, it can hardly be said that these admissions were inadvertent. This is especially true with reference to the second colloquy above quoted, in which the court recapitulates what he conceived to have been admitted, stating at the time that he intended to make those admissions the basis of his decree, and appealing to counsel to say whether there was any dispute as to the facts so recited. The admission of counsel that the facts so recited were correct certainly estops the appellants now to claim that the admissions were never made, or made inadvertently. Moreover, at that time, the decision of this court *en banc*, handed down on April 4, 1913, in the case of *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239, holding that the Wright contract was not a mere option and had never been forfeited, and enforcing specific performance against Suydam, was called to the trial court's attention. This negated the only claim made by the appellants Trimble at the trial that Wright's contract, though prior in time to that of Trimble, was a mere option which had expired as between Suydam and Wright before Trimble purchased the forty acres. While that decision was not binding upon Trimble,

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who was not a party to that action, it emphasizes the necessity that the trial court was under to preserve the *status quo*, by ordering a sale in parcels in inverse order of alienation, until the matter of actual priority could be litigated between Wright and Trimble, should either of them thereafter elect to bring an action against the other for that purpose.

But it is asserted that, if the land, less the nine acres claimed by Wright, be first sold and should sell for sufficient to pay the entire mortgage debt, then the Wright estate would have the land which it claims free from the mortgage. The answer is that, if Trimble owns the entire tract, he will not be injured, since, if he elect to redeem, it will cost him no more to redeem than if the whole tract had been sold for the same amount. By that redemption, he will have the whole tract clear of the mortgage just as if it had all been sold and all redeemed. If, in fact, he does not own the nine acres claimed by Wright, which, by his own admission, he purchased subject to Wright's contract as well as subject to the mortgage, he is not injured, but will get exactly what he purchased. On the other hand, if the sale be made of the forty acres in entirety, Wright, if he has an equitable title to the nine acres, would be seriously prejudiced by the sale, since he could only protect his interest in the nine acres by redeeming the whole forty acres and Trimble would then get the other thirty-one acres free from the mortgage subject to which he purchased as well as subject to Wright's contract. While the appellants are earnestly insisting that the court, by ordering a sale of the two tracts separately, the nine acres claimed by Wright to be sold last, thereby assumed Wright's priority without proof, the real fact is that, by this decree, the court merely assumed that, if Wright had any title at all as against the Trimbles, that title was the prior title. This assumption was clearly sustained by the admissions made at the trial. In any event, if Wright, in future litigation, fail to establish title as against Trimble, the sale as ordered can work no injury to the appellants Trimble. Had the court ordered a

sale of the entire forty acres in one tract, it would, in effect, have assumed, without evidence and against their own admissions, the priority of the claim of the appellant Trimble over that of Wright, which would have been, as we have seen, extremely prejudicial to Wright.

It cannot be doubted that, if Suydam had never contracted to convey to Trimble, and had never conveyed to Trimble, and the same facts relative to Wright's claim were admitted by Suydam as now admitted by Trimble, Wright would be entitled to have the nine acres which he claims sold last, and the balance of the land first subjected to sale to pay the mortgage. In fact, the appellants so concede. But if Wright has any interest as against Trimble, it is because Trimble took title subsequent to Wright's contract and with notice of it. In other words, it is because Trimble stands in Suydam's shoes. Hence, if Wright has any valid claim, it is as valid against Trimble as it would have been against Suydam, and he has the same right to a sale in parcels in the inverse order of alienation against Trimble that he would have had against Suydam.

It is true, as conceded by both sides, that the actual right of ownership of the nine acres as between Trimble and Wright must be litigated in some future action. The court declined to go into a complete trial of this title in this action. The conflict of claims being presented by the pleading, however, and the admissions showing that, if Wright had any valid claim it was superior to Trimble's, it was incumbent upon the court at least to preserve the *status quo* as between these parties, and not by his decree prejudice future litigation of this question of title. This could only be done by ordering sale of the two parts separately and of the Wright tract last. Any other course would have been to adjudge Trimble's claim the prior right, and, in effect, that Wright had no valid claim.

We think the court was justified in entering the decree as made, for the following reasons: *first*, because the mort-

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gagee is not objecting to a sale in parcels as decreed; *second*, because the appellants Trimble objected to trying out the question of priority after admitting that if Wright had any interest, it was a prior interest, but demanded a decree which would assume the appellants' own priority over Wright; *third*, because Wright alleged priority and offered to prove it, but was prevented from so doing by the appellants' objections; if this was error, the appellant invited it; *fourth*, because the sale in parcels cannot seriously injure the appellants, while a sale *en masse* would seriously injure the respondent Wright; *fifth*, because it is manifest that the method of sale which would realize the highest price is that which preserves the right of redemption to both claimants, Wright and Trimble.

The judgment is affirmed.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11779. Department Two. August 15, 1914.]

HARRIET STAHL *et al.*, Appellants, v. LULU SCHWARTZ,
Executrix etc., Respondent.

*In the Matter of the Estate of CATHERINE E. STAHL.*¹

EXECUTORS AND ADMINISTRATORS—DEBTS AND EXPENSES—PAYMENT FROM INCOME OR CORPUS OF ESTATE—RIGHTS OF LIFE TENANT—WAIVER. Where a life tenant, pursuant to an agreement with his coexecutor, paid claims and expenses of administration in part out of the income and in part out of the corpus of the estate, his heirs cannot question the validity of the payments on the ground that they were properly payable out of the corpus of the estate and should be charged thereto, the life tenant making no claim that he was advancing funds for the use of the estate, or expecting repayment, and it clearly appeared that he was fully advised of his rights to one-half of the income and his administrator's fees, and that he was voluntarily acting as he believed for his best interests.

LIFE ESTATES—LIFE TENANT—CONTRACT WITH COEXECUTOR—VALIDITY. An agreement between a life tenant and his coexecutor to use his share of the income from the estate to pay the debts and obliga-

¹Reported in 142 Pac. 651.

tions of the devisor is not void for want of consideration, but only voidable, and his heirs cannot repudiate consummated transactions thereunder, in the absence of a showing that he was innocent of his rights in the premises.

SAME—IMPROVEMENTS BY LIFE TENANT—PERMANENT REPAIRS. While a life tenant is only bound to keep the premises in repair, and is under no obligation to undertake improvements, his making of permanent improvements on the estate is presumed to be his voluntary act, and gives him no claim against the reversioner for payment of any part of the cost of the improvement.

SAME—BUILDINGS OF ESTATE—INSURANCE PREMIUMS—PAYMENT FROM INCOME. The cost of insuring buildings belonging to an estate is properly chargeable to the income of the estate, where the buildings are of immediate benefit to the life tenants, their principal income being derived therefrom, and the evidence shows that their usefulness will not benefit the remainderman, but will, in all probability, be destroyed by the elements before termination of the life tenant's estate.

SAME. Premiums on insurance policies covering buildings subject to a life estate are properly chargeable to the income thereof, on the theory that it was the purpose of the testator that the corpus of the estate should remain intact until the termination of the estate for the benefit of the remainderman.

SAME—STREET IMPROVEMENTS—ASSESSMENTS—PAYMENT FROM INCOME OR CORPUS OF ESTATE. Assessments charged against property subject to a life estate in the income thereof, for benefits from street paving, are properly apportioned between the corpus of the estate and the income, two-thirds to the former and one-third to the latter, where it appears that, while a portion of the improvement is of a permanent nature, the wearing surface will have to be renewed at the end of ten or twelve years, being in the nature of repairs or upkeep and a proper charge on the income, the improvement being forced upon the estate by operation of law and hence not governed by the rule of voluntary improvements; and the fact that part of the improvements affected vacant property producing no income, would not render the corpus of the estate liable for the whole costs thereof, the duty of the life tenant being the same as in the case of income bearing property to conserve the corpus of the estate for the benefit of the remainderman.

EXECUTORS AND ADMINISTRATORS—SETTLEMENT—EXPENSE—COST OF DEFENDING ACTION. An executrix and life tenant, personally interested in a contract, is not to be personally charged with the costs of defending an action on the contract, entered into by her in good faith in the interests of the estate as well as in the interest of the

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parties to it, where the validity of the contract was debatable, and she exercised her best judgment in making the defense; but the same is properly charged against the income.

SAME—INHERITANCE TAX—PAYMENT. Heirs of a life tenant who, with his coexecutor, paid the inheritance tax due the state out of the income of the estate, cannot assert that the sum paid should be charged to the corpus of the estate, upon settlement of the final account of the surviving executrix, the payment having been made voluntarily and with full knowledge of their rights in the premises.

SAME—BUILDINGS OF ESTATE—PERMANENT IMPROVEMENTS—PAYMENT FROM CORPUS OF ESTATE. The cost of repairs to a building made by the executrix of an estate, subject to a life estate in the income, which repairs were of a permanent nature and changed the property from nonincome bearing to income bearing property, is properly charged to the corpus of the estate, the evidence showing that the building will probably inure to the benefit of the remainderman, but failing to disclose any basis upon which an apportionment could be made between the life tenants and the remainderman.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered May 29, 1913, upon findings in favor of an executrix, in the settlement of her final account, after a hearing upon a contest. Affirmed.

Rader & Barker, for appellant Stahl.

John C. Hurspool and *F. B. Sharpstein*, for appellants Lillian E. Schwartz *et al.*

Dunphy, Evans & Garrecht, for respondent Lulu Schwartz.

FULLERTON, J.—Catherine E. Stahl died, in Walla Walla county, on April 16, 1908, leaving the following will:

"I, Catherine E. Stahl, do make, publish and declare the following to be my last will and testament.

"(1) I direct the payment of all my just debts out of my estate.

"(2) To each of my grandchildren, Magdalene Louise, Ernest William and Henrietta, children of my deceased son, Henry Stahl, I give and bequeath ten thousand dollars, the said sum without interest to be paid to each of my said grandchildren on the arrival of each at the age of majority, should any of said grandchildren die before arriving at the age of majority but leave a surviving child or children, then said

child or children shall take by way of representation the share to which the parent would be entitled if living, and if any of my said grandchildren die without issue before arriving at the age of majority, I direct that the sum that such grandchild would have received had the age of majority been attained, be paid in equal shares to the remaining grandchildren, should two survive, and attain the age of majority; and in case but one of said grandchildren should survive to the age of majority, the other two have died without leaving issue as aforesaid, then said grandchild alone to take the full sums herein bequeathed to all of said grandchildren.

"(3) I will and direct that none of my real estate be sold for five years after my death.

"(4) I give, devise and bequeath unto my daughter, Lulu Schwartz, one-half of the remainder of my property of whatsoever character and wheresoever situated, of which I may die seized, to be hers absolutely.

"(5) In the other half of all my property of whatsoever character and wheresoever situated, of which I may die seized, I will, bequeath and devise a life estate to my son, Frank H. Stahl. After determination of said life estate, I will, devise and bequeath the remainder of said one-half of all my estate to any child or children of my said son, Frank H. Stahl, born to him in lawful wedlock after the date of this will, but should there be no such child or children born to him in lawful wedlock after the date of this will, or the issue of such child or children, I then give, devise and bequeath said remaining one-half of my said estate as follows: One-half thereof to the children of my deceased son, Henry H. Stahl in equal shares and one-half thereof to the children of my daughter, Lulu Schwartz in equal shares, subject, however, to a trust to pay the income thereof to the surviving widow of my said son, Frank H. Stahl, during her widowhood, but should she remarry she is thereupon to be paid out of the trust estate, five thousand dollars and all the interest of said widow in said estate is thereupon to cease and be determined.

"(6) The contingent provisions herein are not to be construed as either hindering the segregation of my estate or as preventing the same remaining intact after the year of administration, and to the end that the full share herein willed to my daughter, Lulu Schwartz, may be apportioned to her, I direct that at any time after the year of administration up-

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on the request of my said daughter, Lulu Schwartz, my executors hereinafter named shall, and they are hereby granted full power and authority to apportion and distribute to her the proportion of my estate to which she is entitled under the provisions hereof.

“(7) I nominate and appoint as the executors of this will, my children, Lulu Schwartz and Frank H. Stahl, and direct that letters testamentary issue to them and they execute this will without being required to furnish any bond or security; and I give unto my said executors full power to manage and control and in any way use and deal with any and all property of my estate during its administration without any application to any court for leave or confirmation. I do also empower my said executors to continue any business conducted by me or dispose of the same on such terms as they may see fit. In making investments or reinvestments or in conduction or continuing any business said executors are expressly authorized and empowered to proceed and act as they may deem wise and prudent; all without leave or approval of any court and without liability or responsibility for the consequences of their acts or for losses incurred as a result thereof.

“(8) I hereby revoke all former wills made by me.”

Mrs. Stahl left a considerable estate, which was immediately taken possession of by the executors named in the will, and administered by them jointly until the death of Frank H. Stahl, which occurred on October 28, 1909. Frank H. Stahl left surviving him his widow Harriet Stahl, but no child or children born after the date of the will of Catherine E. Stahl. On the death of Frank H. Stahl, the surviving executrix entered into a contract with Harriet Stahl concerning the future management of the estate, which agreement was acted upon by the parties thereto until August 4, 1910, when Harriet Stahl began an action in the superior court of Walla Walla county against the surviving executrix, praying that the contract be set aside, that an accounting be had, and that she be paid such proportion of the income of the estate as she was justly entitled to receive under the provisions of the will. Judgment went in her favor in the superior court,

and was affirmed by this court on appeal. *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856.

After the remittitur from this court reached the superior court, the executrix filed in that court an account with the estate, showing the then existing condition of the estate, and the receipts and expenditures on behalf thereof from the date of the death of Catherine E. Stahl to the date of the filing of the account. A hearing was had thereon, after due notice given, in which various objections were made to items of the account by Harriet Stahl, and by the guardians *ad litem* appointed by the court to represent the minor residuary legatees and devisees. At the conclusion of the hearing, the court entered a decree in which he allowed certain of the items objected to and disallowed others, and determined from what fund the several items of expenditure should be paid; that is, whether from the income or from the corpus of the estate. Harriet Stahl appeals from certain portions of the decree and the guardians *ad litem* from certain others. These we will notice in their order.

Prior to her death, Catherine E. Stahl had inaugurated certain improvements upon her property which were only partially completed at the time of her death. She also was indebted in certain sums, and certain indebtedness was incurred as funeral expenses and as expenses in the administration of the estate preceding the death of the executor Frank H. Stahl. The executors, upon taking charge of the estate, caused the improvements begun by their deviser to be completed, and paid the cost thereof, together with the debts of the deceased, her funeral expenses, and the expenses of administration incurred prior to the death of Frank H. Stahl, in part out of the income and in part out of the corpus of the estate. There was, also, a building situated upon lands belonging to the estate which had been fitted up as a place in which to conduct a moving picture show. The executors found it impossible to secure a paying tenancy for the building as it was then fitted and caused the same to be refitted

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as a store building, putting therein a modern front at a cost of \$850. This sum the executors also paid out of the income of the estate. In the settlement of the account, the court allowed these items to stand charged to the funds out of which the executors had paid them; that is to say, such portion of the expenditures as the executors had paid out of the corpus of the estate he allowed to stand charged against the corpus of the estate, and such portions as they had paid out of the income he allowed to stand charged to the income. It is the contention of the appellant Harriet Stahl that these items were properly payable out of the corpus of the estate, and should be so charged; further contending that, if the items be so charged, and Frank H. Stahl be given credit for his part of the income used in paying them, and he be given credit for his fees as executor, it will be found that the estate was indebted to him at the time of his death in the sum of \$7,846, and she now asks that the several items be so charged and that she, as his heir at law, be paid that sum out of the estate by the surviving executor.

It is, perhaps, the rule that a devisee of a life estate in the income of property, where there are no words of explanation or limitation in the devise creating the estate, is entitled to the income without diminution by the payment of the debts, funeral expenses, and costs of administration of the estate of the devisor, and had Stahl in this instance been a stranger to the administration there would be foundation for the claim here made. But Stahl was one of the executors. He actively participated in the administration of the estate, and together with his co-executor selected the fund out of which the payments now in question were made. During his lifetime, he made no claim that he was advancing funds for the use of the estate, or that he expected repayment, nor is there any evidence in the record that he was ignorant of his rights in the premises. On the contrary, it directly appears, we think, that he was fully advised of his rights, and that he made the payments out of the funds selected pursuant to an agreement

with his co-executor, and was acting as he believed for his best interests. It does not follow that, because he could have taken for his own use one-half of the entire income, and his administrator's fees, he must do so. On the contrary, the income was his own to do with it as he pleased. He was at liberty to apply it on the debts and other obligations of his devisor if he so desired, and since the disposition made of it was voluntary on his part, and with knowledge of his rights in the matter, his heirs cannot lawfully question such disposition.

But counsel say that any agreement on the part of Stahl to surrender his income for the payment of his devisor's debts, her funeral expenses, and expenses of administration of her estate out of his share of the income therefrom is invalid for want of consideration, under the authority of *Stahl v. Schwartz*, before cited, and since Stahl could have repudiated the agreement, his heir may also repudiate it. But the agreement was, at best, voidable rather than void, and his heir cannot for that reason repudiate any consummated transaction had in pursuance of it; at least, without a showing that he was ignorant of his rights in the premises, and of this, as we say, there is no showing in the record.

There is, moreover, another general rule applicable to the payments made to complete the structures under way at the time of Catherine E. Stahl's death, and the expenditures made to remodel the building mentioned as being remodeled by the executors during the lifetime of Frank H. Stahl. This rule is that a life tenant who makes permanent improvements upon the estate of which he is tenant is presumed to have made them voluntarily. He is bound to keep the premises in repair, but is under no legal obligation to undertake improvements. If he does so, it is a voluntary act of his own, which gives him no claim against the reversioner for the payment of any part of the cost of the improvement. Tiedeman, Real Property (2d ed.), § 68. We reach the conclusion, therefore, that

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Frank H. Stahl left no estate intermingled with the estate of Catherine E. Stahl that is collectible therefrom.

A part of the estate of Catherine E. Stahl consisted of city lots on which there had been erected substantial buildings, the rentals from which produced a considerable part of the income of the estate. These buildings the executors kept insured at about ninety per centum of their value. The insurance premiums were paid out of the income of the estate, and the court, in the settlement of the account, allowed them to be charged thereto. The appellant Stahl contends that these premiums should be apportioned between the income and the corpus of the estate. Her counsel argue that, since the evidence discloses that the life of these buildings is fifty years and the expectancy of life of the tenant is but thirty-four years, the life tenant should not be compelled to pay more than 34-50 of the cost of the insurance, and that the remainder should be charged to the corpus of the estate. The question whether the cost of insuring the buildings of the estate are properly chargeable to the income or the corpus of the estate was before the Court of Appeals of the State of New York in *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965. It was there said that the authorities on the question were not in precise harmony, although it was intimated that the differences arose because of the differences in the conditions and circumstances of the particular cases; the court holding, in the case before it, that the premiums were properly chargeable to the income of the life tenant and not to the fee of the remainderman. We think the true solution of this problem is found in the answer to the question, to whom will the benefit inure. If the insurance benefits solely the life tenant, then the tenant must pay the premiums; if to the remainderman, then he must pay it; if to both the tenant and remainderman, it must be apportioned between them.

Tested by this rule, we think the trial court properly charged these premiums to the income of the estate rather than to the fee. While no finding was made on the question

by the trial court, we think it fairly deducible from the evidence that the life of an ordinary building, such as were erected on the premises in question, is fifty years. Not fifty years from the date of the trial, as the appellant assumes, but fifty years from the date of their construction, which was more than sixteen years prior to the date of the trial. If this length of time be the true duration of the life of the buildings, it is plain that the remaindermen cannot reasonably expect benefit from the continuance of the buildings on the property. As the appellant's life expectancy is now thirty-four years, the elements will, in all probability, destroy their usefulness before the termination of the estate of the life tenant. On the other hand, the buildings are of immediate benefit to the life tenants. From their rental, is derived a principal part of the life tenants' income, which would be lost by the destruction of the buildings, and they, not the remaindermen, have the immediate interests.

Moreover, there is another general principle applicable to this class of expenses that must be kept in mind. This principle was stated by Judge Gray in *In re Albertson*, 113 N. Y. 434, 21 N. E. 117, in the following language:

"The usual purpose of the testator in providing for a beneficial interest in a trust estate is, that the net income shall be applicable only, and that the *corpus*, or capital, of the trust estate shall remain intact until the trust shall have determined. The principle has been so long and firmly established that interest on mortgages, taxes, repairs and all those current expenses, which are fairly incidental to the maintenance of the realty used by a life tenant, are payable by him, that it should be adhered to upon all occasions, unless, in so doing, we violate a plain direction to the contrary; which, if not found in the will in so many words, yet is the only one which a fair and reasonable construction permits of our finding."

Since, therefore, it is the policy of the law to keep the estate intact for the remaindermen, and since the benefit derived from the insurance will, under the doctrine of probabilities,

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inure solely to the benefit of the life tenants, it is but just that they should bear its burdens.

The city authorities of the various cities in which parts of the estate is situated caused certain of the streets in their respective municipalities to be improved by paving the same and constructing concrete sidewalks thereon at the expense of property benefited. Parts of such improvements extended in front of property belonging to the estate, and assessments were levied or threatened against the several tracts benefited by the improvement. These assessments and threatened assessments the surviving executrix paid. The trial court heard evidence as to the character of the improvements, and in its decree apportioned the amounts so paid between the corpus of the estate and the income, charging two-thirds of such costs to the former and one-third to the latter. The court proceeded on the theory that a certain part of the improvement was not of a permanent nature. He concluded from the evidence that the concrete base of the improvement was of a permanent nature, but that the wearing surface, which the witnesses stated must be replaced at the end of ten or twelve years, was in the nature of repairs or upkeep, and is a proper charge on the income of the estate. We think the evidence justifies the holding of the court. This was not a voluntary improvement. It was forced upon the estate by operation of law, and hence does not fall under the rule of a voluntary improvement, and since it accrues to the benefit of the remaindermen as well as the life tenant, the cost thereof was properly apportionable between them.

The appellant, however, calls attention to the fact that certain of these improvements were made in front of vacant property, which produces no income, and the costs as to this, she contends, should be charged entirely to the corpus of the estate. But the duty of the life tenant towards nonincome bearing property is the same as it is towards income bearing property. The life tenant takes the estate as he finds it. Whether the estate be controlled by the tenant personally, or

by executors, it is equally the duty of the person having such control to conserve the corpus for the benefit of the remainderman. In cases like the one before us, where broad powers as to the management of the property are vested in the executor, it is the duty of the executor to see to it that nonincome bearing property is not carried too long to the detriment of the person entitled to the income. If there is no reasonable prospect of such property becoming income bearing, it must be disposed of in a reasonable time and the proceeds invested in income bearing property. But common business prudence must be exercised in this regard; the property should not be unreasonably retained in the hope of gaining unearned increments, nor should it be sacrificed by sales for less than its reasonable value. In this instance, the deviser expressed a desire that the real property be not sold until five years after her death. The executrix should give heed to this request. In the meantime, therefore, and such further time as it may reasonably take the executor to reinvest the estate, the taxes, repairs, and all those current and incidental expenses which are fairly incidental to the maintenance of the estate, must be paid from the income.

The court allowed the executrix to pay the costs expended by her in the defense of the case of *Stahl v. Schwartz* out of the income of the estate. This is the case formerly referred to as appealed to this court and reported in 67 Wash. 25, 120 Pac. 856. It is the contention of the appellant that the case was defended by the executrix for her own benefit, and that the costs thereof should be charged to her personally, and neither to the corpus of the estate nor to the income. The action, as will be observed from an inspection of the report cited, was one to set aside a contract entered into between the executrix and the appellant. This contract was entered into in good faith by the executrix believing that it was to the interest of the estate as well as the parties thereto. While she might properly have consented to annul it on the appellant's demand, the validity of the contract was debatable, and

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if, in the exercise of her best judgment, she concluded that it was to the interest of the estate to make the contest, she should not be punished individually for her mistake of judgment. The rule is to tax the costs of litigation affecting an estate, expended by the executor or administrator in good faith, to the estate, whether the litigation be unsuccessful or not, and we see no reason to depart from the rule in this instance. As the litigation affected the management and not the property of the estate, the cost was properly chargeable against the income.

The inheritance tax due the state of Washington on the death of Catherine E. Stahl, was paid by the executors of the estate from the income during the life of Frank E. Stahl. It is insisted that this sum should be now charged to the corpus of the estate. But this sum was paid out of the income by the executors voluntarily, during the life of Frank H. Stahl, when he with his coexecutor was entitled to the income. It cannot now be recovered by his successor to the income.

The guardians *ad litem* appeal from the orders of the court allowing certain charges to be made against the corpus of the estate. These contentions, with one exception, have been discussed by us in discussing the questions suggested on the appeal of Harriet Stahl, and need not be further noticed here.

The exception noted relates to a house which was repaired by the executrix at a cost of some \$4,000. The house in question was constructed of brick many years ago, and was so far dilapidated as to be unfit for habitation. The repairs put thereon practically rebuilt it, changing it from nonincome bearing to income bearing property. The court allowed the costs of the repairs to be charged to the corpus of the estate on the ground that it was an improvement of a permanent nature, and thus an investment of funds in the hands of the executrix. While there is some question in the evidence as to the durability of the structure erected, we agree with the trial court that the reasonable probability is that it will inure to the benefit of the remaindermen. This being so, the expense

was, at least, properly apportionable between the life tenants and the remaindermen, but since the evidence does not disclose any basis upon which to make an apportionment, we will permit the charge to stand as the trial court left it.

Our conclusion is that no substantial error appears in the record, and that the judgment appealed from should be affirmed. It will be so ordered.

Crow, C. J., PARKER, MOUNT, and MORRIS, JJ., concur.

[No. 11874. Department One. August 15, 1914.]

FREDERIC H. McKAY, *Appellant*, v. JOHN J. STEPHENS *et al.*,
Respondents.¹

APPEAL—NOTICE OF APPEAL—NECESSARY PARTIES. Upon appeal from a judgment dismissing the petition of contestants of a will, co-contestants not joining in the appeal, but who appeared in the trial court and had a direct interest in the controversy, are necessary parties upon whom notice of appeal must be served, under Rem. & Bal. Code, § 1720.

SAME—NOTICE OF APPEAL—WAIVER—EFFECT. The failure of a will contestant to serve notice of appeal on co-contestants not joining in the appeal, who were necessary parties, is not cured by a waiver of appeal filed long after the time for appeal or the joining in appeal, nor by affidavits setting forth a verbal stipulation between attorneys of record for different contestants that appellant might prosecute an appeal without the necessity of serving notice upon the co-contestants.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered June 17, 1913, upon findings in favor of the defendants, in a will contest, tried to the court. Appeal dismissed.

Wakefield & Witherspoon, A. C. Shaw and J. N. Pickrell,
for appellant.

W. W. Hindman and E. W. Wagner, for respondents.

¹Reported in 142 Pac. 662.

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ELLIS, J.—The respondents have moved to dismiss this appeal. The facts material to the motion are as follows: On June 16, 1910, Ralph Comegys, one of the executors named therein, filed, in the office of the clerk of the superior court of Whitman county, a will of Frank Rider, deceased, dated May 6, 1909, with a first codicil thereto, dated December 29, 1909, and a second codicil dated April 26, 1910, and with it a petition for the admission of that will and the codicils to probate. On the same day, Frederic H. McKay, named as executor in another will of the deceased, which was dated April 12, 1910, filed that will and with it his petition that it be admitted to probate. The court, on June 16, 1910, set, as the date of hearing of both petitions, July 1, 1910. At that time, formal proof of the execution of both wills was taken, and thereafter, on July 13, 1910, the will and codicils first above mentioned were admitted to probate as the last will and testament of the deceased.

On July 11, 1911, the Ladies' Benevolent Society of Spokane Falls, the Maria Beard Deaconess Home, a corporation, and Frederic H. McKay, devisees under the will of April 12, 1910, filed their petition in the nature of a contest of the first mentioned will, seeking to revoke its probate and the admission of the last mentioned will to probate in its stead. This petition was signed by J. N. Pickrell, Will G. Graves, H. M. Stephens, and Wakefield & Witherspoon, as attorneys for the petitioners. On March 21, 1913, the cause was brought on for trial. After a lengthy trial, the court, on June 13, 1913, made findings of fact and conclusions of law in favor of the contestees, and on June 17, 1913, entered a decree dismissing the petition of the contestants. On September 5, 1913, the contestant McKay alone gave notice of an appeal to this court. That notice was served upon the contestees John J. Stephens, H. M. Roberts, and Ralph Comegys by delivery of a copy thereof to E. W. Wagner, one of their attorneys, which service is evidenced by his acceptance of service dated September 5, 1913. No service of any kind was ever made upon any

of the other parties to the proceeding. Neither the Ladies Benevolent Society of Spokane Falls, nor the Maria Beard Deaconess Home, was served with notice of appeal or joined in the appeal, or gave any independent notice of appeal. They were parties to the proceeding, appeared in the trial court and had a direct interest in the controversy which they there asserted. Judgment was entered against them, and their interests must be affected by any action this court could take if it entertained the appeal of their co-contestant, McKay. Service upon them of notice of that appeal was therefore requisite to our jurisdiction of the appeal. Rem. & Bal. Code, § 1720 (P. C. 81 § 1191). *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641.

On July 6, 1914, two days before the hearing in this court, there were filed in this court certain affidavits. One was an affidavit of Will G. Graves, to the effect that he dimly recollects entering an appearance for the firm of which he is a member, in a will contest proceeding in the superior court of Whitman county, which he thinks is this action; that his recollection is that his appearance was on behalf of the Ladies Benevolent Society; that, whatever the fact, neither he nor his firm had any further connection with the trial, it being understood that the firm of Wakefield & Witherspoon should have entire charge of the proceedings and that it would be unnecessary for notice of any of the proceedings to be served upon the affiant or any member of his firm, and that the facts, as he remembers them, are similar to those stated in the affidavit of H. M. Stephens in relation to the action. The other was an affidavit of H. M. Stephens to the effect that, on the filing of the original and amended petition to contest the will of Frank Rider, deceased, he was attorney of record for the Ladies Benevolent Society of Spokane Falls, a corporation; that it was then agreed between Messrs. Wakefield & Witherspoon, attorneys for Frederic H. McKay and affiant, as attorney for the Ladies Benevolent Society, that it would not actively participate in the contest, otherwise than, being one

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of the beneficiaries under the will, it would join in initiating the contest in conjunction with McKay, but not otherwise; that the proceedings and expenses were to be taken and borne by McKay; that, if successful, it would bear its part of the expense, but that if unsuccessful, it would not further participate or bear any of the expense; that affiant took no part in the contest other than to enter his appearance; that the proceedings were to be under the exclusive control of Wakefield & Witherspoon, attorneys for McKay; that, if he desired to do so, McKay might appeal without the necessity of serving upon the society, or upon affiant, as its attorney, any notice of appeal, or connecting the society or its attorney with the appeal to the supreme court; that it was agreed that notice of appeal would be waived by the society and by affiant; that the society was represented in all proceedings by Messrs. Wakefield & Witherspoon; that pursuant to the agreement, affiant has filed, in behalf of the society, in this court, a waiver of notice of appeal.

The above mentioned waiver, signed by H. M. Stephens as attorney for the Ladies Benevolent Society of Spokane Falls, "at the initiation of the contest but not otherwise," was filed in this court on July 6, 1914. The waiver is, of course, a nullity, and of no curative effect. It was filed only two days before the hearing of the appeal in this court, more than a year after the rendition of the judgment appealed from, and long after the time for an appeal or a joining in the appeal had expired. If the Ladies Benevolent Society could now, with any effect, waive notice of appeal, it must be because it has not lost its right to appeal by lapse of time. By the clear terms of the statute, it had lost that right; hence, at the time of its waiver, it had nothing to waive.

Nor are the affidavits in question more effective. They merely set forth, in vague and uncertain terms, a verbal stipulation (hence legally binding on no one) between the attorneys of record for different contestants, waiving in advance the jurisdictional steps in the appeal. Even so, the other

appearing contestant, Maria Beard Deaconess Home, a corporation, is left wholly unaccounted for. Our right to take jurisdiction on appeal is fixed by statute, and can only be invoked by an observance of the statute. It cannot be conferred by stipulation, however formal, much less by a vague verbal understanding between litigants years in advance. To indulge such a course would be unwarranted in law and unwise in practice. It would render the statute nugatory, and would lead to uncertainty, confusion, and needless controversies, intolerably exasperating alike to court, counsel, the members of the bar generally, and to litigants.

Disregarding these affidavits, as we must, this case falls directly within our decision in *Beckman v. Brommer*, 57 Wash. 436, 107 Pac. 190, both upon the law and the facts. We there said:

"Here the appearing heirs at law were unsuccessful litigants, were all aggrieved by the final judgment, and were entitled to either an original or a cross-appeal. The reason and necessity for serving them existed, and such service should have been made."

See, also, *Robertson Mortgage Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312; *Robertson Mortgage Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795, and especially *Long Bell Lumber Co. v. Gaston*, above cited, for an exhaustive discussion of our statute and a discriminating review of our decisions construing it.

The appeal is dismissed.

Crow, C. J., MAIN, GOSE, and PARKER, JJ., concur.

[No. 11900. Department Two. August 15, 1914.]

NORTH COAST FIRE INSURANCE COMPANY, *Appellant*, v.
LINCOLN COUNTY, *Respondent*.¹

AGRICULTURE—NOXIOUS WEEDS—COST OF DESTRUCTION—NOTICE TO OWNER—TAXATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 3040 as amended by Laws of 1911, p. 328, relating to the cutting of noxious weeds, and providing for notice to owners of land to destroy weeds growing thereon, or on the streets or highways bordering the land, and that in case such weeds are growing on the land of a non-resident of the state, such notice shall be made by posting in a conspicuous place on the land, implies a personal service of notice on resident owners, and county officers acquire no jurisdiction to levy a tax upon land of a resident owner for the cost of cutting weeds, under notice posted on the land after failure to learn the place of his residence.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered October 9, 1913, dismissing an action to set aside a tax, after a trial upon an agreed statement of facts. Reversed.

McBurney & O'Connor, for appellant.

James S. Freece and C. A. Pettijohn, for respondent.

PARKER, J.—This is an action to cancel, and enjoin the collection of, a tax, levied upon land now owned by the plaintiff, in Lincoln county, to pay the cost of destroying noxious weeds growing thereon. From a judgment of the superior court of that county denying the relief prayed for by the plaintiff, it has appealed to this court.

It is contended by counsel for appellant that the tax was unlawfully levied upon the land of which it is now the owner, and that the tax is void in that it was sought to make the cost of destroying noxious weeds a charge thereon without previous personal notice requiring the owner of the land to destroy such weeds, as prescribed by Rem. & Bal. Code, § 3040, as amended by Laws of 1911, ch. 60, p. 328.

¹Reported in 142 Pac. 661.

During the whole of the year 1912, and for some time prior thereto, William E. Bergey was the owner of the land upon which the tax is sought to be levied. During all the time he was such owner, he was a resident of Spokane, in this state. On the 21st day of May, 1912, the road supervisor of the road district in Lincoln county, in which the land is situated, "posted notice for the destruction of noxious weeds upon the land, which was in all respects a good and sufficient notice to a nonresident landowner." No personal service of any such notice was ever made upon William E. Bergey, the then owner of the land. During the whole of the year 1912, the land was unoccupied, and William E. Bergey, the owner, had no agent in Lincoln county. The road supervisor did not know or learn of the place of residence of William E. Bergey, though he made due inquiry relative thereto, and posted the notice on the land, believing that William E. Bergey was not a resident of the state of Washington. Appellant became the owner of the land in the year 1913, after the levy of the tax thereon, through foreclosure of a mortgage upon the land, which had been executed by William E. Bergey's grantor. These are the agreed facts.

Section 3040, Rem. & Bal. Code, as amended by chapter 60, page 328, Laws of 1911, so far as necessary for us to notice its provisions, reads as follows:

"It shall be the duty of each road supervisor in each road district in this state to see that the provisions of this act are carried out within their respective districts, and he shall give notice to the owner, lessee, occupant, agent or person having the care or charge of any land within his district whereon, or in any road, street or highway bordering thereon, any noxious weeds are growing, requiring such owner, lessee, occupant, agent or person having the care or charge thereof, to cause the same to be cut down within ten days from the service of such notice, and in case such owner, lessee, occupant, agent or person having the care or charge thereof shall refuse or neglect to cut down said noxious weeds within said ten days, then the said road supervisor shall enter upon the land, or on any road, street or highway bordering thereon, and cause all said weeds

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to be cut down with as little damage to growing crops as may be: Provided, That when such noxious weeds are growing upon land or on any road, street or highway bordering thereon, of a non-resident of this state, and such owner has no known agent in the county in which such land is situate, said notice shall be posted in a conspicuous place on the land in view of the traveling public”

Other provisions of the law relate to levying of the cost of the destroying of the weeds by the road supervisor upon the land. In view of the plain language of this section, and the fact that William E. Bergey, the owner of the land at the time of the attempted charge of this tax upon it, was a resident of the state of Washington, it seems quite plain to us that he was, by the express terms of this statute, entitled to personal service of the notice therein required to be given owners of land, other than nonresident owners, before the county officers could lawfully levy upon the land a tax to pay the cost of destroying noxious weeds growing thereon. The notice which was given by the road supervisor was clearly only such a notice as may be given under the law to nonresident owners. Indeed, it was given upon the theory that William E. Bergey was a nonresident owner. It is true that the law is silent as to the manner of service of notice upon resident owners of land, but it seems to be elementary law that, when a statute requires notice to perform some duty imposed by law, as a condition precedent to charging a debt or penalty against a person because of failure of such performance, without any special provision as to the nature of the service, such notice must be served personally. In the text of 21 Am. & Eng. Ency. Law (2d ed.), 583, it is said:

“Where a statute requires the giving of notice and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, personal notice must always be given.”

See, also, 29 Cyc. 1119. Some contention is made that, for the purpose of serving notice upon him, William E. Bergey should be regarded as a nonresident, in view of the road super-

visor's efforts to learn the place of his residence. The answer to this suggestion is that the statute does not provide, either directly or by inference, that an owner whose residence does not happen to be known to the road supervisor, or cannot, by due diligence, be ascertained by him, shall be subject to service of the notice as a nonresident owner. Such argument might be appropriately addressed to the policy of the law, but is of no force as determining what the law is, in the light of its plain provisions.

Considerable is said by counsel for respondent in their brief touching the question of the power of public officers to abate nuisances without any notice to the owners of land upon which such nuisances may be suffered to exist. There are nuisances of such a menacing character that they may be abated by public officers, even though private property rights be invaded by such abatement, without notice to those possessing such property rights. This, however, is not a question of the power of the state, acting through its duly constituted authorities, to abate a nuisance. It is a question of the exercise of the power of taxation to pay the cost of abating a nuisance, and the acquiring of jurisdiction by the county officers to levy such tax in the manner expressly provided by law. In so far as the levy of this tax is concerned, we are of the opinion that the county officers acquired no jurisdiction to levy it, because of want of notice required to be given to resident landowners. The power of the county officers to cause the destruction of the noxious weeds as a nuisance, with or without notice, is not here involved. We conclude that the judgment of the learned trial court must be reversed and the cause remanded, with directions to enter a judgment cancelling the tax and enjoining its collection.

It is so ordered.

Crow, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

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[No. 11914. Department Two. August 15, 1914.]

H. H. COGSWELL *et al.*, *Appellants*, v. MORTON COGSWELL
et al., *Respondents*.¹

WATERS AND WATER COURSES—EASEMENTS—WATER CONDUIT—CONSTRUCTION BY LESSEE OR DISSEISOR—SEPARATION OF ESTATE. Where a father and son disagreed as to the ownership of a half section of land, occupied by the son as lessee or disseisor, and litigation ensued, but before trial a compromise agreement was made whereby the son was conveyed thirty acres of the land on which the house, barn and orchard were located, reserving to the son the right to purchase any additional part of the land at its market value, but failing to make reservation with reference to a conduit which the son had constructed to convey water from a spring located on the property retained by the father to the dwelling house and other buildings belonging to the son, the conveyance of the thirty acres did not operate as an implied grant of an easement in the use of the conduit, but failure to make reservation in the settlement agreement, with reference to the conduit and the water, operated as a relinquishment of any claim to the enjoyment thereof.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 11, 1913, dismissing an action for an injunction, after a trial on the merits to the court. Affirmed.

L. H. Prather, for appellants.

Don F. Kizer, for respondents.

MOUNT, J.—This action was brought by the appellants to enjoin the respondents from interfering with a pipe line conveying water from a spring, on premises owned by the respondents, to a dwelling house, barn, and outhouses on premises owned by the appellants. The case was tried to the court without a jury. At the conclusion of the trial, the court dismissed the action. This appeal followed.

The facts are not disputed, and are substantially as follows: The appellant H. H. Cogswell is the son of the re-

¹Reported in 142 Pac. 655.

spondents Morton Cogswell and wife. In the year 1894, Morton Cogswell was the owner of a half section of land in Spokane county. At that time, H. H. Cogswell and wife took possession of the land by the consent of his father. Between that time and the year 1910, he constructed valuable improvements upon a portion of the land. These improvements consisted of a dwelling house, barn, outhouses, a lawn, orchard, and other improvements. In connection with these improvements, in about the year 1906, he constructed a pipe line from a spring of water 1,500 feet distant from his dwelling house, and thereby supplied water to his dwelling house, lawn and barn from this spring.

In the year 1910, a dispute arose between the father and his son as to the ownership of the half section of land. The son claimed that it had been given to him by his father, and the father claimed that the property had never been given to the son. Litigation between the parties ensued, but, before the trial of the case, a compromise settlement was agreed upon. The substance of this settlement is stated in *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 481. It was, by that settlement, agreed that the father should convey to his son the thirty acres of land in dispute upon which the farm house, barn, and orchard were located, and that all the remainder of the land should belong to the father. In that settlement, a reservation was made to the effect that the son might purchase any additional land of the half section which he desired, at its market value. The contract provided the method by which the market value should be determined. That case was thereupon dismissed, and in pursuance of the agreement, the father deeded to his son the thirty acres out of the above mentioned half section. This contract was dated in November, 1910. In January, 1911, a deed for thirty acres was made by the father to his son.

The spring from which the conduit was constructed was not upon the thirty acres, but was upon the property of the father. No mention of this conduit was made in the deed or

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in the contract, and no reservation thereof was made. Shortly thereafter, the father took up the pipe which was upon his premises, and about two years later, this action was brought to restrain the respondents from interfering with the conduit, and for damages.

The appellants rely upon the following cases: *Nicholas v. Chamberlain*, 2 Croke's K. B. Rep. 121; *United States v. Appleton*, 1 Sumner (U. S.) 492; *Hazard v. Robinson*, 3 Mason (U. S.) 272; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Vermont Central R. Co. v. Hills*, 23 Vt. 681. All of these cases are to the effect that, where water is conveyed in an aqueduct from a spring upon another portion of the grantor's land to land conveyed, and there used by the grantor at the time of the conveyance, any diversion of the water by the grantor, although upon that portion of the land not conveyed by deed, will be a disturbance of the right of the grantee, for which an action may be sustained. This rule, if it applies to the facts in this case, must govern.

But the trial court was evidently of the opinion that the facts in this case did not come within that rule. The leading case upon the question is *Nicholas v. Chamberlain*, *supra*. All the other cases above cited and relied upon by the appellants refer to this case, and follow the rule there announced. In that case it was said:

"That if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards

sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. But by Popham, Chief Justice, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines; he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is, if a disseisor of an house and land erect such a conduit, and the disseisee re-enter, not taking consuance of any such erection, nor using it, but presently after his re-entry sells the house to one, and the land to another; he who hath the land, is not compellable to suffer the other to enjoy the conduit."

It is plainly stated in that case that, where the owner of land constructs a conduit from a spring to the house, and thereafter sells the house with the land, the conduit passes as an appurtenant to the house. But if a lessee or a disseisor constructs the conduit, upon the termination of his lease, or the termination of his possession, the conduit does not pass as an appurtenant when the owner does not use or take cognizance of the conduit.

In the case of *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145, we followed the first rule stated in the *Chamberlain* case, *supra*, and quoted from 3 Farnham, Waters and Water Rights, § 831, as follows:

"If the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have the favorable condition continued. . . . Upon the severance of a heritage a grant will be implied of all those continuous and apparent easements which had been, in fact, used by the owner during the unity . . ."

The undisputed facts in this case show that the appellant H. H. Cogswell was in possession of this property, either as

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lessee or disseisor, when the conduit was constructed. He constructed the conduit from the spring to his buildings. His father, who was the owner of the fee, simply permitted the use, and did not thereafter obtain possession of the house or farm, or use the water in connection therewith. After this conduit was constructed, the appellants made a claim of ownership of all the land. The respondents contested that claim. A settlement of that dispute was had. The thirty acres upon which the appellants had made improvements was granted to the appellants. The balance of the land, including the spring of water, was granted to the respondents. The appellants reserved the right upon that settlement to purchase any part of the land not given to them, within a limited period. This was the only reservation in the settlement. If the appellants had desired to reserve this appurtenant to themselves, they should have done so upon that settlement. They did not make the reservation.

The rule is stated in 14 Cyc. 1171, as follows:

"As regards implied reservations of easements the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee. Accordingly where there is a grant of land with full covenants of warranty without express reservation of easements, the best considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity . . ."

The contract of settlement of the litigation in 1910 by which the appellants received thirty acres of land, must determine the rights of the parties. At that time, the appel-

lants, in effect and substance, released their claim to the half section of land owned by the respondents and took the thirty acres which was afterwards conveyed to them. Not having made any reservation with reference to the conduit and the water, but having made a reservation that they could purchase from the father what additional land they desired at the market value, they must now be held to have relinquished all claims to any part of the lands relinquished to the respondents, except such as was expressly reserved. We think the facts in this case bring it within the rule stated in the *Chamberlain* case, *supra*, to the effect that, if the lessee or disseisor erects a conduit and afterwards the lessor or disseisee reenters not taking cognizance of such erection, nor using it, he is not compellable to suffer another to enjoy the conduit.

We are of the opinion, therefore, that the judgment of the trial court was right, and it is affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

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[No. 11964. Department Two. August 15, 1914.]

WILLIAM C. HODGES *et al.*, Respondents, v. ELLA WRIGHT,
Appellant.¹

APPEAL—BOND—TIME FOR FILING. An appeal will not be dismissed on the ground that the appeal bond was not filed in time, where it appears that, after notice given prior to entry of judgment, and the denial of a motion for new trial, a second notice of appeal was served well within the ninety-day limit, and the bond was served and filed within five days thereafter.

APPEAL—RECORD—ABSTRACT—TIME FOR SERVICE—DISMISSAL. An appeal will be dismissed for failure to serve the abstract of record upon respondents until more than two weeks after service of the appellant's opening brief, and the delay is not excused upon the ground that respondents had proposed amendments to the statement of facts and that the same was not certified until after service of the opening brief; since the statement of facts should have been, in any event, certified long prior to serving the opening brief, and no excuse was offered for the delay (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered August 14, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a collision between a vehicle and an automobile. Dismissed.

Snively & Bounds, for appellant.

Holden & Shumate, for respondents.

MOUNT, J.—The respondents move to dismiss this appeal upon the grounds, first, that the appeal bond was not filed within five days after the notice of appeal was served; and second, that the appellant did not serve upon the respondents an abstract of the record and statement of facts at or before the time of serving the opening brief.

There is no merit in the first ground. Apparently there were two notices of appeal. The first was given prior to the

¹Reported in 142 Pac. 692.

entry of the judgment. After the entry of the judgment, on August 14, 1913, the appellant filed a motion for new trial. This motion was denied on the 16th day of September, 1913. A new notice of appeal was served on the 12th day of November, 1913, well within the ninety-day limit. The bond on appeal was served and filed on November 15, 1913, well within the five-day limit. The notice of appeal and the bond were clearly within time under the statute.

The appeal must be dismissed upon the second ground, under the rule laid down by this court in *Ollar-Robinson Co. v. O'Neill*, 80 Wash. 1, 141 Pac. 194, where we said:

"We can only enforce the statute so as to meet its plain purpose by holding the service of the abstract before or at the time of the service of the opening brief a mandatory step in the prosecution of an appeal which we have no power either to waive or excuse."

The statement of facts was filed and served upon the respondents upon the 14th day of October, 1913. The appellant's opening brief was served upon the respondents on the 6th day of April, 1914. The abstract of the record was not served upon the respondents until the 23d day of April, 1914, or more than two weeks after the service of the appellant's opening brief.

The appellant seeks to excuse the delay in the service of the abstract of the record upon the ground that the respondents had proposed amendments to the statement of facts, and that the statement of facts was not certified until after the service of the appellant's opening brief. We find nothing in the record to indicate that any amendments were offered to the proposed statement of facts. But even if amendments were offered, the statement of facts should have been certified long prior to serving the opening brief. It was certified on the same day or the day following. It was not served until more than two weeks later. No excuse is offered for this delay, even if such excuse were available. Under the rule in the *Ollar-Robinson* case, *supra*, it was the duty of the

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appellant to serve the abstract of the record at or before the time of service of the opening brief. This was not done, and for that reason the appeal must be dismissed. It is so ordered.

CROW, C. J., PARKER, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—I am compelled to dissent from the disposition of this case made by the majority. Following the case of *Ollar-Robinson Co. v. O'Neill*, the case is dismissed because the abstract of record was not served at or before the time of the service of the opening brief. To hold that the abstract must be served at or before the time of the service of the opening brief, is not in my opinion, a correct interpretation of even the technical words of the statute. The statute does not require an appellant to serve the abstract of record at or before the time of the service of the opening brief, but requires it to be served, to quote its language, "at or before the time when he is required by rule or statute to serve his opening brief." In this case, therefore, even under the strict wording of the statute, the abstract may have been served in time although served some two weeks later than the service of the opening brief. It would seem to follow that inquiry should be made whether the abstract was served at or before the time in which the appellant was required by rule or statute to serve his opening brief, before the case is dismissed.

But my chief complaint is against the principle involved in the rule itself. I cannot conceive that a practice act should receive such a highly technical construction. In the case at bar, the respondent has not been in any way prejudiced, nor has the court been in any way inconvenienced, by the lapse of the appellant, and to deny the appellant to have her cause heard upon the merits because of such lapse, is a punishment grossly disproportionate to the character of the offense.

The motion to dismiss should be denied.

[No. 12072. Department Two. August 15, 1914.]

THE STATE OF WASHINGTON, *on the Relation of William J. Meyer et al., Plaintiff, v. MILES L. CLIFFORD, as Judge etc., Respondent.*¹

DISCOVERY—EXHUMATION OF BODY—RIGHT TO—EVIDENCE—SUFFICIENCY. The evidence is insufficient to justify an order for the disinterment of the body of a father to determine his alleged impotency, upon an issue in probate proceedings as to the parentage of children, where it appears that more than two years elapsed after the interment before application was made therefor, and that an examination of the body would, in all probability, fail to establish the facts sought thereby.

BASTARDS—ACKNOWLEDGMENT BY PARENT—DISCOVERY—EXHUMATION OF BODY. Where, in probate proceedings, the question of the parentage of children was in issue, and it was shown that the father, upon obtaining a divorce from his first wife, acknowledged and swore in the presence of a witness that the children in question were born to his first marriage, thereby admitting them to be his children, as provided by Rem. & Bal. Code, § 1345, the court is not justified in ordering disinterment of the father's body and the appointment of physicians for the purpose of determining his alleged impotence.

DEAD BODIES—BURIAL—REMOVAL. The court will not order the exhumation of a body for the purpose of reburial in another place, its present resting place being selected by the widow of deceased, although he expressed a wish to be buried in another cemetery, and though title to the burial lot was in dispute, the evidence showing that a stepdaughter, the alleged owner of the lot, made no objection to the body resting in its present grave until more than two years after burial, and that the application for removal was a mere pretext for the exhumation of the body to determine the questioned parentage of deceased's heirs.

Certiorari to review an order of the superior court for Pierce county, Clifford, J., entered May 9, 1914, in probate directing an administrator to exhume a body, after a hearing upon affidavits. Reversed.

¹Reported in 142 Pac. 472.

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Boyle, Brockway & Boyle, for relators Meyer.

H. W. Lueders, for relators McAllister *et al.*

Gordon, Easterday and *John Mills Day* for respondent administrator *et al.*

MOUNT, J.—This proceeding is brought here by writ of certiorari to review an order of the superior court for Pierce county, in probate, entered on the 9th day of May, 1914, directing the administrator of the estate of Frederick Meyer, deceased, to exhume the body of Frederick Meyer, appointing three physicians to make an examination of the body and to report the result thereof to the court; and further directing the administrator to remove the remains of the deceased from Steilacoom cemetery to a cemetery known as Gravelly Lake cemetery, all at the expense of the estate. Before the final order as above stated was entered, an application was made here for a writ of prohibition. This court denied the writ upon the ground that the order when made could be reviewed upon a writ of certiorari. *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 189 Pac. 650.

The case was tried to the lower court upon affidavits. Upon these affidavits, an order was made as above stated. The facts as shown by the record are substantially as follows: In the year 1858, Frederick Meyer was married to Frances Louisa Meyer. During wedlock, eleven children were born to Mr. and Mrs. Meyer. The oldest of these children is now 58 years of age and the youngest, if living, is 34 years of age. In the year 1880, Frederick Meyer, in the district court of the territory of Washington, filed an action for divorce against Mrs. Meyer upon the ground of adultery. In that action, he set out the names of the children that were born to them, and their ages. He denied the paternity of the two youngest children, who were then of the ages of four years and one year respectively. It is apparently conceded that he obtained a divorce in the year 1880 upon the ground stated, although the decree is not in the

record. Shortly after the decree of divorce in that case, and in June, 1881, Frederick Meyer was married to Agneta Chambers. Mrs. Chambers at that time was a widow, having two children, a son and a daughter, named Robert L. Chambers and Margaret A. Peterson. No children were born to Mr. and Mrs. Meyer by this marriage.

On June 23, 1911, Frederick Meyer died, leaving an estate of about \$13,000. His body was buried in the Steilacoom cemetery on June 25, 1911, at the request of his widow, in a lot the title of which stood in the name of Margaret A. Peterson, daughter of the widow by a former marriage. Margaret A. Peterson knew of this burial a few days after it had been made, and she apparently made no objections thereto at that time. Robert L. Chambers, son of Agneta Meyer by a former marriage, was soon thereafter appointed administrator of Mr. Meyer's estate. On December 24, 1911, Agneta Meyer, the deceased's second wife, died.

On September 20, 1913, the administrator of the estate of Frederick Meyer filed a final report and a petition in the superior court, stating that, through inadvertence and oversight, the body of Frederick Meyer was interred in a lot in Steilacoom cemetery belonging to Margaret A. Peterson, and that said remains were so interred without the knowledge of Margaret A. Peterson, and that she insists that the remains be removed; that the administrator has heard, upon good authority, and believes, that none of the children by the former wife of the deceased, are heirs at law of said deceased; that, during practically all his life, the deceased was impotent, and died without issue; that the administrator believes that an examination of the remains by competent physicians will disclose the fact that the deceased, Frederick Meyer, was sterile at the time of his death, and for many years previous had been a eunuch; and prayed for the disinterment of the remains and for the appointment of physicians to make an examination of the body, and that the ad-

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ministrator be authorized to incur the reasonable expenses in that behalf.

A little later on, in November, 1913, Margaret A. Peterson filed a petition making the same allegations, and praying for the same relief. Citations were issued to all parties interested, and appearances were made by affidavits contradicting the allegations of the petitions. Affidavits were also made by the petitioners controverting these affidavits. The court thereupon made the order sought to be reviewed in this proceeding. An issue was made upon the petition of the administrator and of Margaret A. Peterson, to the effect that the children of Frederick Meyer by his former wife were not his legitimate children, and therefore had no right to inherit his estate. It was upon this issue that the petitioners sought to have the probate court exhume the body of the deceased for the purpose of an examination to determine whether he was a eunuch when his body was interred.

It is claimed by the respondents that it was proper for the court to make the order for exhumation of the body for the reason that, if the deceased was a eunuch, he was not competent to get children, and that this fact is a material one upon the issue presented. It may be the rule that, where the interests of justice demand it, and where there is no other way to prove a fact except by the exhumation of a body which has been interred, the court may make an order for the disinterment of the body and an examination thereof. As was said in *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446:

"We are not prepared to say that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect. It would be a proceeding re-

pugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives that they would prefer an abandonment of the suit to a compliance with the order. Without undertaking to define with accuracy what circumstances would justify the making of such an order, we think that a case calling for it was not shown in this instance. The suit had been pending quite eighteen months before it was brought to trial, and during that time no steps had been taken to procure any testimony tending to establish the defense set up, nor was there any competent legal testimony adduced upon the trial with this view."

This statement is in accord with our views upon the question. In this case, it was shown without dispute that Frederick Meyer died on June 23, 1911, and was buried on the 25th of the same month. Two years and a half elapsed after the interment before this application was made. The application was then made, not upon knowledge, but upon hearsay statements and information and belief. The affidavits filed on behalf of the relators here show that one of the sons of the deceased by his first wife knew, of his own knowledge, that his father had never been castrated. And the nurse who bathed him and cared for him during his final illness made an affidavit to the same effect. If these affidavits are to be taken as true, and they appear to be reasonable upon their face, an examination would avail nothing. The affidavits filed by the physicians show that they were not certain that an examination would be of any practical value, because of the disintegration of the body in case it was interred in wet soil. It is apparent that, if an examination were made of the body after it has been buried for a period of two years and a half, and it is discovered that the deceased had been castrated during his lifetime, it would not necessarily follow that he was castrated before the birth of his children, the youngest of whom was born more than thirty years prior to his death. No such order should be made ex-

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cept upon a strong showing that the facts sought will be established thereby.

The respondents in this case apparently rely upon the authority of *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. A. 153, where the respondent was a passenger on the appellant's train and sued to recover damages for injuries alleged to have been sustained as such passenger. The court in that case authorized an examination of her person. That, of course, is an entirely different case from this; so different that it need not be specifically distinguished. In that kind of a case, an examination would amount to something when it was made. But here an examination at this time would, in all probability, fail to disclose the fact which is desired, and if it was disclosed, would not be evidence of the fact that such condition had existed for a period of more than fifty years.

It seems to us that another and sufficient reason for reversing the order of the trial court is that Frederick Meyer, at the time he obtained his divorce from his first wife, alleged that these children were born to him and his first wife in lawful wedlock. The statute at Rem. & Bal. Code, § 1345 (P. C. 409 § 643), provides:

"Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child . . ."

Frederick Meyer, in the year 1880, when he obtained his divorce from his first wife, acknowledged and swore in the presence of a witness to the fact that these children were born to his first marriage, and thereby admitted that they were his children, clearly within the terms of the statute. And hence it follows that, even if the children were illegitimate, which is almost beyond reason to believe, they thereby became his lawful heirs under the statute. The exhumation of the body, then, even if the fact should appear upon examination that Frederick Meyer was a eunuch, would not avail as

against this positive proof that he had recognized the children as his own.

For all these reasons, we are satisfied that the trial court erred in ordering the exhumation of the body and the appointment of the physicians to make the examination.

It is argued by the respondents, further, that the court properly ordered the exhumation of the body for the purpose of reburial in another place. And we are cited to *Wood v. Butterworth & Sons*, 65 Wash. 344, 118 Pac. 212, that the wish of the deceased, if it be ascertainable, must control the place of his burial. What was there said was said in regard to a case where the body had not yet been interred. It is true, it is shown in the record here that the deceased expressed a wish to be buried in another cemetery. But at the time of his interment, his widow, the mother of these respondents, was living. At her request, the body was laid to rest at the place where it now is. It is true, an issue is made in this case as to the ownership of the lot in which the body rests. The relators contend that the title is held by Margaret A. Peterson in trust for her stepfather and her mother, and was paid for by money furnished by Frederick Meyer for the purpose of buying the lot; while the respondents contend that the lot was purchased by Margaret A. Peterson with her own money and in her own right. It is conceded that she was not present at the funeral of her stepfather. But she was at her mother's home within a few days after the funeral; and apparently has made no objection to the body resting in its present grave, until this application was made. It is apparent, under these facts, that this application for removal of the body from its present grave to another cemetery is a mere pretext for the exhumation of the body. She has acquiesced in its resting place for two years and a half. If the property is hers, she may show that fact in a proper action, and obtain possession. But in this proceeding, the title to this lot cannot be tried, and especially upon affidavits. If the question is, should the body be removed upon the applica-

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tion of the administrator merely, such order might come within the discretionary powers of the probate court. But viewing it, as we do, as a mere pretext for an exhumation of the body, it has little or no weight.

We are satisfied that, upon both grounds, the order was made without sufficient cause or excuse, and it is therefore reversed and set aside.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 11406. Department One. August 15, 1914.]

JOHN T. HUETTER *et al.*, Respondents, v. WAREHOUSE & REALTY COMPANY, Appellant.¹

CONTRACTS—PERFORMANCE OR BREACH—DEFECTS IN PLANS—PART PERFORMANCE—RECOVERY. Subcontractors may recover from the principal contractor for work done and materials furnished in attempting performance of a contract in exact accordance with defective plans and specifications prepared by the engineer in charge, which rendered performance of the contract impossible; and although the plans and specifications were furnished by the city and not by the principal contractor, in the absence of any warranty by the subcontractors as to the sufficiency of the plans; and there is no implied warranty from the fact that the subcontractors had seen the plans on file with the city and contracted with reference thereto.

SAME—ANTICIPATED PROFITS—RECOVERY. In such case, the subcontractors are not entitled to recover profits which could have been realized had the contract been capable of performance.

Cross-appeals from a judgment of the superior court for Spokane county, Huneke, J., entered May 12, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, by direction of the court, in an action on contract. Affirmed.

Cullen, Lee & Hindman (E. Eugene Davis, of counsel), for appellant.

Post, Avery & Higgins, for respondents.

¹Reported in 142 Pac. 675.

CROW, C. J.—Action by John T. Huetter and Joseph Zirnigbl, copartners, against Warehouse & Realty Company, a corporation, to recover the amount claimed to be due upon a construction contract. From a judgment in plaintiffs' favor, the defendant has appealed, and plaintiffs, being dissatisfied with the amount of the judgment, have cross-appealed. We will refer to the parties as plaintiffs and defendant.

On August 24, 1908, the defendant, Warehouse & Realty Company, for an agreed consideration of \$86,900, entered into a written contract with the city of Spokane, whereby it agreed to construct a large fill and viaduct on Sprague avenue; the work to be done in accordance with plans and specifications prepared by the city engineer, and under the supervision, and to the satisfaction of the city engineer. On October 24, 1908, this contract was sublet by the defendant to plaintiffs; it being agreed that plaintiffs were to perform their subcontract in exact accordance with the plans and specifications prepared by the city engineer. Plaintiffs were to be paid on stated estimates made by the city engineer; eighty per cent thereof to be paid on each estimate when made and delivered, the remaining twenty per cent to be retained until the entire improvement was completed.

Plaintiffs entered upon the performance of their contract, and continued work until September 17, 1909, when a large portion of the south wall of the fill collapsed and fell. The work had been done in exact compliance with the plans and specifications, under the supervision and direction of the city engineer, who had made and delivered to plaintiffs a number of estimates. Neither of the plaintiffs was an engineer, but after the wall had fallen, they employed two expert civil engineers to examine the work and the plans and specifications, and report whether performance of the contract would be possible. These engineers, after examination, determined and reported that the plans were defective, and that any wall constructed in accordance therewith would not stand. Plaintiffs notified defendant of this report, and announced their

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readiness to proceed with the work if the plans were modified so as to make the construction possible. The city ordered the defendant corporation to proceed with the work, and defendant in turn ordered plaintiffs to proceed. This the plaintiffs refused to do under the existing plans. The defendant thereupon endeavored to complete the work, and a short time thereafter a large portion of the north wall fell. Thereupon, defendant abandoned the work. Sometime later, the plans were changed, and the work was completed under the new plans.

Prior to October 9, 1909, the defendant had paid plaintiffs \$54,755.86, eighty per cent on estimates. On that date, the city engineer made and delivered to plaintiffs a further estimate to the effect that all the work then completed, including that previously estimated, was of the value of \$71,359.70, and that there was then due plaintiffs \$2,067.20; it being understood that twenty per cent of the total estimates was still to be withheld. The amount then due, the defendant did not pay. About June 12, 1909, plaintiffs entered into a contract with Brown Brothers, of Spokane, for an iron railing to be placed on the fill as required by the plans and specifications, at a cost of \$2,775. This railing was never used, although tendered to the defendant by the plaintiffs.

After the work had been completed by the city, the defendant instituted a proceeding in mandamus against the city and its officials, to compel the engineer to make, and the city to allow, an estimate in the sum of \$18,662.15 for work done by plaintiffs. In that proceeding the defendant asserted and established the fact that the plans and specifications were worthless; that the work could not be performed thereunder; and obtained judgment in accordance with its demand.

At the time plaintiffs ceased work, 1,500 yards of rock had been blasted on defendant's lots for use in the fill. It was stipulated upon the trial that it had cost plaintiffs \$725 to blast this rock. It was also stipulated that plaintiffs had drilled one hundred and eight holes for further blasting, at an

expense of \$108. Defendant afterwards used this rock, and availed itself of the benefit of the holes in its attempt to prosecute the work. It further appears that, when defendant undertook to complete the work, it used certain tools and equipment belonging to plaintiffs, the rental value of which was stipulated to be \$625. The defendant refused to make any further payments to plaintiffs for the work done by them before the walls fell, and plaintiffs instituted this action to recover the twenty per cent retained, the unpaid estimate, and the other items above mentioned.

On the trial, no material dispute appeared as to the facts or the amounts involved, and the trial court directed a verdict and judgment in plaintiffs' favor for \$26,967.29. Plaintiffs had demanded the further sum of \$2,982.15 as profits which they would have realized had they completed the contract. This item the court refused to allow, and on such refusal, plaintiffs predicate their cross-appeal.

Defendant's main contention is that it was plaintiffs' duty to complete the work in accordance with their contract. It insists that the contract was an entirety; that plaintiffs are not entitled to recover, having failed to complete it, even though it was impossible of performance, and that plaintiffs are not excused from complete performance by reason of defective plans and specifications prepared by the city engineer. It further insists that the plans were furnished by the city and not by defendant; that they were on file with the city clerk; that plaintiffs had access to them, and are in no position to insist that, by reason of defects in the plans and specifications rendering the contract impossible of performance, they are exonerated from performing their work; that, not being so exonerated, and having failed to complete their contract, they are not entitled to recover the twenty per cent of estimates withheld, or to recover upon the other demands presented in their complaint.

In support of its contention that plaintiffs were compelled to finish the work in accordance with the defective plans and

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specifications, and must suffer any loss occasioned by the falling of the wall, the defendant, with other citations, directs our attention to *American Surety Co. v. San Antonio Loan & Trust Co.* (Tex. Civ. App.), 98 S. W. 387, and *Loneragan v. San Antonio Loan & Trust Co.* (Tex.), 104 S. W. 1061, the cases mentioned being the ones upon which it places its main reliance. These Texas cases seem to support defendant's contention; but, from the doctrine there announced, we withhold our consent, believing it illogical, contrary to our previous rulings, and in conflict with decisions from other courts which we are constrained to follow. In *Ward v. Pantages*, 73 Wash. 208, 131 Pac. 642, the plaintiffs, as contractors, installed a plumbing system and a heating plant in defendants' building in strict compliance with plans and specifications prepared by an architect whom defendants had employed. The work proved unsatisfactory. Holding that plaintiffs were entitled to recover, and citing the case of *MacKnight Flintic Stone Co. v. Mayor etc.*, 160 N. Y. 72, 54 N. E. 661, to which reference is hereinafter made, we said:

"Appellants earnestly contend that the systems adopted, especially for the heating plant, were suggested and warranted by respondents. This respondents deny. The evidence upon the issue thus raised was resolved by the trial court in respondents' favor. If, as respondents contend, and the trial court properly found, the plans were adopted by appellants' architects, all that the respondents can be held to have warranted was that they would install the systems in a workmanlike manner, in strict compliance with the adopted plans, and there is sufficient evidence to sustain the finding that this was done. We conclude from the evidence that respondents made no warranty of the systems adopted, but that their only warranty was to install them in strict compliance with the plans and specifications, which they did.

"Where the builder performs his work strictly in conformity with plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications, and may recover under the contract, unless he has warranted that the plans and specifications are correct.' 6 Cyc. 63."

In the record before us, there is nothing to indicate that the plaintiffs warranted the plans and specifications prepared by the city engineer. They were not civil engineers, nor did they have any special knowledge of the fact that the plans and specifications were defective or that it would be impossible to construct the improvement in accordance therewith. In *MacKnight Flintic Stone Co. v. Mayor etc., supra*, in discussing the question here presented, Vann, J., of the New York Court of Appeals, said:

"The defendant specifically selected both material and design and ran the risk of a bad result. If there was an implied warranty of sufficiency, it was made by the party who prepared the plan and specifications, because they were his work, and in calling for proposals to produce a specified result by following them, it may fairly be said to have warranted them adequate to produce that result. If I agree to produce a certain result according to my own plan, I impliedly warrant its sufficiency; but if I agree to produce that result by strictly following the plan prepared by another party, he impliedly warrants its sufficiency. The responsibility rests upon the party who fathers the plan and presents it to the other with the implied representation that it is adequate for the purpose to be accomplished. A stipulation requiring a contractor to produce a certain result by following the plan and directions of the owner is an undertaking that it can be done in that way. . . .

"It would not be reasonable to hold the parties to have intended that the plaintiff was to do a great deal of work and furnish a large quantity of materials according to the specifications of the defendant, and under the direction of its officers, with no right to vary from the materials or construction specified, and yet get no pay for it unless it produced a certain result, without very plain language to that effect, which we do not find in the instrument before us, although it is elaborate in form, and embraces the most minute details. Parties might make such an agreement, but if the language used admitted of a different construction the courts would be apt to adopt it and thus avoid the conclusion that an impossible result was intended. The fault of the defendant's plan should not prevent the plaintiff from recovering payment for

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good work done and good materials furnished precisely as the defendant required. The reasonable construction of the covenant under consideration is that the plaintiff should furnish the materials and do the work according to the plan and specifications, and thus make the floors water tight so far as the plan and specifications would permit."

The learned judge then cites the following authorities, which sustain his conclusions: *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *MacRitchie v. Lake View*, 30 Ill. App. 393; *Filbert v. Philadelphia*, 181 Pa. St. 530, 37 Atl. 545; *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338; *Cunningham v. Hall*, 86 Mass. 268; *Burke v. Dunbar*, 128 Mass. 499; *Perkins v. Roberge*, 69 N. H. 171, 39 Atl. 583; *Clark v. Pope*, 70 Ill. 128; *Rice v. Forsyth*, 41 Md. 389; *Weld v. Goldenberg*, 65 Fed. 466; *Smith v. Consumers' Cotton Oil Co.*, 86 Fed. 359; *Hoe v. Sanborn*, 21 N. Y. 552; *Byron v. Mayor, etc.*, 22 J. & S. 411.

The theory upon which defendant insists that plaintiffs, as a condition precedent to their right to recover, should have completed their contract, conceded to have been impossible of performance, is that, having contracted after seeing the plans and specifications, they impliedly warranted the sufficiency of such plans. In the absence of an express warranty incorporated in their written contract, they cannot be held to have made any warranty whatever. If a contractor cannot perform by reason of defective plans which he is required to follow, which render the contract impossible of performance, which were not prepared or provided by him, but were prepared and provided by the owner, or by his architect or engineer, there would seem to be no just reason why the contractor may not recover for work done in strict compliance with such plans and specifications, under the supervision and to the satisfaction of the owner, architect or engineer, in an attempt to perform the contract. In *Bentley v. State*, *supra*, the state entered into a contract with Bentley

whereby he agreed to erect additions to a public building in accordance with plans and specifications prepared and furnished by an architect employed by the state. Portions of the building fell because the plans and specifications which had been carefully followed, were defective. Thereafter, the contractor restored the building, and sued to recover for labor and material used in so doing. The state defended upon the ground that the plaintiffs, at their own cost and expense, were bound to furnish all materials and perform all work necessary to restore the construction according to new and modified plans which were adopted and followed. In other words, the state, in substance, contended that the contractors assumed the risk of the sufficiency of the original plans and specifications. Passing upon this question, the court said:

"The state undertook to furnish suitable plans and specifications, and required the plaintiffs to conform thereto, and assumed control and supervision of the execution thereof, and thereby took the risk of their efficiency. What was thus done, or omitted to be done, by the architect, must be deemed to have been done or omitted by the state. Moreover, we must hold, notwithstanding the English case cited [*Thorn v. Mayor*, L. R. 1 App. Cas. 120], that the language of the contract is such as to fairly imply an undertaking on the part of the state that such architect had sufficient learning, experience, skill, and judgment to properly perform the work thus required of him, and that such plans, drawings, and specifications were suitable and efficient for the purpose designed. There seems to be no lack of able adjudications in support of such conclusions."

The English case of *Thorn v. Mayor*, L. R. 1 App. Cas. 120, *supra*, affirms the previous decision of the court of Exchequer in the same case, reported in 9 Exch. 163, cited and followed in *American Surety Co. v. San Antonio Loan & Trust Co.*, *supra*, and was distinguished with irresistible logic in *Bentley v. State*, *supra*, from which we have quoted the foregoing excerpt. The defendant has contended that the plans and specifications were not furnished by it, but

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were furnished by the city. This suggestion is immaterial, for the reason that, when the defendant contracted with the plaintiffs, it required the plaintiffs to follow the plans and specifications prepared by the city engineer, thus adopting and approving such plans as between plaintiffs and itself.

The trial court, in the final judgment, permitted the plaintiffs to recover all items demanded, as above stated, except the profits which plaintiffs claim they would have realized had they completed the contract. We do not find it necessary to enter into a detailed statement of the items allowed by the trial judge. The amounts were not in dispute. We hold that a just conclusion was reached. The plaintiffs have been permitted to recover the full value of work done by them in their attempt to fulfill a contract which was impossible of complete performance by reason of the defective plans and specifications. We see no reason why they should recover any further sum.

Other assignments of error need not be discussed. We find no prejudicial error in the record, and the judgment will be affirmed. Neither party will recover costs on this appeal.

CHADWICK, MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11147. Department Two. August 17, 1914.]

MEL G. DUNCAN *et al.*, *Appellants*, v. PERCY F. PARKER
et al., *Respondents*.¹

BROKERS—CONTRACT FOR COMMISSIONS—PERFORMANCE—SALE BY OWNER. Where brokers authorized to sell property were not permitted to complete negotiations pending between them and a prospective customer, being told to temporarily cease their efforts to close a sale, but the owners took up negotiations and, without consulting the brokers, entered into an option contract of sale, the owners are estopped from asserting that the brokers failed to furnish a customer able and willing to take the property on the terms under which they were authorized to sell; the general rule that the securing of an optional contract of sale by a broker employed to effect an actual sale does not entitle him to recover a commission in advance of a sale, not applying in such case.

SAME—ACTION FOR COMMISSIONS—DEFENSES—CONTRACT OF OWNER. In an action by brokers to recover commissions claimed to be due for the sale of certain real and personal property, upon the owners' obtaining an option contract of sale, the brokers not being permitted to complete negotiations pending between them and the customer, the owners cannot plead the terms of the contract as a defense to the right of the brokers to recover; since they could not make a contract with the brokers' customer defeating their right to commissions until after the brokers had concluded their negotiations.

PLEADING—DEPARTURE—REPLY. In an action for brokers' commissions, the reply does not constitute a departure, where the action was founded upon an original contract, the complaint alleging a purchase price of \$150,000 on which the plaintiffs claimed commissions, and, the defendants having answered setting up a subsequent contract as a substitute for the original, with facts tending to show nonperformance, the reply, while admitting the subsequent contract, alleged that it was only partially set out in the answer and that it was supplemental and in addition to the original contract authorizing the plaintiffs to recover \$5,000 additional; since the reply was not an abandonment of the original cause stated in the complaint or an attempt to recover upon an inconsistent cause of action, even if plaintiffs misconceived the effect of the supplemental contract; the pleadings as a whole presenting the entire issue and warranting recovery to the extent of the proof, regardless of the amount claimed.

¹Reported in 142 Pac. 657.

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Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 25, 1912, dismissing an action on contract, upon granting a nonsuit. Reversed.

Zent, Powell & Redfield and *Lovell & Davis*, for appellants.
J. S. Workman and *George D. Lantz*, for respondents.

FULLERTON, J.—This is an appeal from a judgment of nonsuit, entered in an action brought by the appellants against the respondents to recover commissions claimed to be due for the sale of certain real and personal property. In April, 1911, the respondents owned a tract of land, situated in Benton county, on the line of the North Coast Railway Company, which they had caused to be platted into a townsite, under the name of Benton City. The record title to this property stood in the name of the respondent Percy F. Parker. At the same time, the respondents Pitman and Woods severally owned desert land claims situated near the townsite. The respondents had also organized a corporation for supplying the town of Benton City and the immediate surrounding country with water for domestic and irrigating purposes, the capital stock of such corporation being owned by the respondents. On April 14, 1911, the respondents, acting through Parker, the holder of the record title, entered into a contract with the appellants Mel G. Duncan and Oliver Dean, and the respondent Elza Dean, as real estate brokers, by the terms of which the brokers undertook to sell for the respondents the townsite property at scheduled prices, for a commission based on the purchase price of each lot or parcel of land sold.

The brokers entered upon the performance of the contract and expended considerable sums of money in advertising the property and exhibiting it to prospective purchasers, but were unable to dispose of it sufficiently fast to satisfy either themselves or the owners. The expense incident to carrying the property had become quite a burden upon the owners, and they became extremely anxious to dispose of it to some person

able financially to relieve them of further expenditures. In the early part of July, 1911, the respondent Pitman, as the representative of the owners, called upon the brokers and discussed with them the possibility of disposing of the entire property in bulk; that is, the desert land claims and the stock in the water company, as well as the townsite property. Several persons were mentioned in this conversation as persons who might be induced to take over the property, among whom was one P. Mullins and one S. J. Harrison; and a tentative agreement was entered into by which the brokers undertook to dispose of the property in bulk for a commission of \$5,000 in case of a satisfactory sale. The terms of this contract were afterwards confirmed by letter from Pitman to Duncan, each representing his respective associates, which letter we quote in full:

"July 8th, 1911.

"Mr. Mel G. Duncan,

"305 So. 2d St., San Marco Apts., North Yakima, Wash.

"Dear Sir: I am enclosing herewith a letter for the purpose of special arrangement made with you at the time of my call at your office, a few days ago. This will, I think, serve your purpose nicely, as I have endeavored to cover the entire Benton City undertaking, including the 320 acres of orchard lands, very fully.

"You are authorized to undertake a sale of the entire property on the terms set out in the letter above referred to, with Mr. P. Mullins and his friends, and also with Mr. Harrison and associates. I would not like for you to go outside of these parties without first conferring with us in relation to the matter. My idea is to restrict your canvass to parties who are able financially, and who would be satisfactory purchasers in case you can accomplish a deal.

"You are to understand that you will not be rigidly bound by the figures set out in the letter. If you can interest either combination of gentlemen named upon lower figures (provided, of course, they are not too low), we will entertain a proposition upon any terms which will provide sufficient cash payment to reasonably guarantee the sale.

"I believe you can afford to give special and personal attention—all, of course, in a confidential way—to the working

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up of a sale with both of these parties, simultaneously. It seems to me that a trip to the Sound, for the purpose of seeing Mr. Harrison, should be immediately in order, and that your negotiations with each combination should be framed as far as possible upon the assumption that the present owners are going to make an immediate turn of the property; and if your prospective purchasers desire to interest themselves at all, they should do so without delay.

"In case you make a sale, either at the figures named or any lesser price acceptable to us, we will pay you a flat commission of \$5,000, the commission to be payable one-half from the first payment if the same is less than one-third of the consideration, and the remainder *pro rata* from the payment of the succeeding 25 per cent of the consideration paid upon the property. In case there should be more than one-third of the consideration paid in cash, the total commission of \$5,000 will be deducted from the cash payment.

"I am sending, under separate cover, some photographs and other data which will assist you in making a clear presentation of the property, and suggest that you add thereto such maps, advertising matter, etc., from your own collection as will complete the same in the most attractive manner.

"Very truly yours,

"F. L. Pitman."

The enclosure not specifically mentioned in the letter was a general letter descriptive of the property, setting forth its situation, its advantages as a townsite, and the terms on which it could be purchased. The brokers immediately took up the question of the sale of the property with the parties named, making two trips to the Sound to interview Harrison. While the negotiations with Harrison were in progress, he was seen by Pitman and the matter of the purchase talked over between them. After one of these interviews, Pitman wrote Elza Dean an undated letter, but postmarked August 2, 1911. in which he used the following language:

"Sorry I failed to meet you. Don't say anything to Mr. Harrison regarding Benton. Also tell Mel to pass him up for the present. This I think important."

After the receipt of this letter, the brokers ceased their efforts to close a sale with Harrison, and the negotiations thereafter with him were conducted entirely by the owners. These negotiations resulted in a contract of sale to Harrison, bearing date of October 2, 1911, the material parts of which are as follows:

"This agreement . . . witnesseth, that for and in consideration of the sum of Seventy-two Thousand, Five Hundred and One (\$72,501) Dollars, receipt of one dollar of which is hereby acknowledged, the remainder to be paid as hereinafter set out, the parties of the second part hereby sell to the parties of the first part, all of the unsold lots, blocks and parcels of land of said townsite as hereinafter enumerated, upon list marked 'Exhibit A' hereto attached and made a part hereof together with all of the stocks of the Benton City Company, . . . and all of the right, title and interest of the said Charles E. Woods and Sadie I. Woods, his wife, and F. L. Pitman and M. E. Pitman, his wife, in and to said desert claims above described, together with the reservoir, pipe lines, ditches and improvements thereon, and the parties of the first part agree to purchase the same under the conditions herein and at the price above stated.

"It is agreed that the title of said property shall be transferred on or before October 15th, 1911, free and clear of all encumbrances to the Spokane & Eastern Trust Company, or such person in their employ as shall be designated by said Trust Company as Trustee, to be held in trust for the benefit of the said parties of the first part, and with full power and authority in said trustees to act for parties of the second part in all matters pertaining to said trust, and the carrying out of the terms, intent, and purposes of this contract, and to hold said title until the consideration hereunder shall have been paid in full, together with interest thereon. . . .

"It is further agreed that the parties of the first part shall have the right to sell any portion or all of said property at a minimum of one-half the list price of the property within the townsite of Benton City, as the same is shown upon the price list hereto attached and made a part of this agreement, and that they shall also have the right to assign or sell any portion or all of the said desert claims at the minimum price of One Hundred Fifty (\$150) Dollars per acre, and that as said

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sales shall be negotiated by them, or under their authority, the said Spokane & Eastern Trust Company will join with them in the issuing of contracts or deeds in accordance herewith, and in form satisfactory to parties hereto.

"It is further agreed that the total sum of \$72,500, hereinbefore set out as the sum remaining unpaid upon said property, shall be due and payable on the 30th day of October, 1921, together with all unpaid interest thereon, from and after the first day of October, 1914, all past due interest shall be considered principal and shall draw interest after maturity. Said payment and the interest as specified shall be reduced by any payment or payments which shall have been made from sales of property to said date of October 30, 1921, in accordance with the conditions herein for the making of sales.

"As a part consideration hereunder the parties agree to improve the lands covered by this contract and every part thereof, excepting . . . on or before the 30th day of August, 1914, and to improve at least one-third of said property each year, beginning with October 15th, 1911, said improvements shall consist of the grading of said land and the growing thereon of agricultural or horticultural crops by irrigation in a first-class and husbandlike manner.

"It is further agreed that a portion of said property, amounting to the aggregate of \$30,000 at retail price selected by said first parties, shall be reserved and used by them in the improvement of said land and property, and that contracts to third parties will be executed by said trustee upon request of said first parties, covering said lands thus reserved or any part thereof, in payment for work and materials utilized in said improvement. The selection of said lands by first parties may be made at any time from the unsold areas of said property. No accounting for the use of said lands shall be demanded from first parties by second parties, excepting a showing that the full value of said land has been received by the first party in either labor and materials and used for the improvement of said land as herein set out.

"It is further agreed that said first parties will at all times diligently urge the sale of said lands in accordance herewith, and that eighty (80%) per cent of all proceeds of and collections thereon shall be paid over to said trustee for the benefit of said second parties until the full sum of \$72,500

and the interest thereon has been paid, provided said first parties shall be permitted to retain not exceeding one-half of all payments upon each and every sale of said lands until the actual cost of selling in commissions paid by them to third parties shall have been covered; it being understood that no commission under this paragraph shall exceed 20% of the amount of the sale. Said parties agree to make a statement to the said trustee upon the first day of each and every month after the date hereof showing the sales and collections made during the preceding month and to remit with said statement the amount due in accordance with this paragraph.

"It is further understood by and between the parties hereto that all of the personal property owned by said parties and used in the development of said land and now located upon the land, are included in this transfer to said third parties. The same consists of hay on hill and at barn; two horses, one wagon, one buggy, set harness, halters, robes, etc.; office furniture, plows, shovels, picks, etc.; hose and hose wagon, wood-stave pipe and pipe fixtures, worth in total the sum of \$905, and that in case said first parties shall make default in the terms of this contract, and second parties are thereby compelled to foreclose or annul the same, that in that case the said parties of the first part agree to refund in cash to said second parties for said personal property in this paragraph mentioned the sum of \$905, and that in case said first parties fail to make said payments, that the same may be collected by process of law as a true and just obligation.

"Time is of the essence of this agreement, and it is understood by and between the parties hereto that failure on the part of the parties of the first part to comply with any of the terms and conditions hereinbefore set out on their part to be performed shall work a forfeiture of this contract, and improvements made on said lands shall be accepted as liquidated damages, without any further claim against said parties of the first part, or the same may be foreclosed as a real estate mortgage."

After the execution of the contract, the brokers presented to the owners a claim for commissions, which claim the owners refused to recognize. This action was thereupon begun to recover the same, resulting in a judgment of nonsuit, as before stated. The trial judge rested his conclusion on two

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grounds; first, that the contract entered into between the owners and Harrison was an option to purchase merely, not an enforceable contract of sale, and applied the general rule that a broker, empowered to sell real estate upon stated terms, cannot recover a commission when he produces a purchaser willing only to enter into an optional contract to take the property; and, second, that conceding the contract to be a sale, the brokers could only recover commissions on the basis of the sums paid on the contract, and that here the proofs failed to show that any sum had as yet been paid to the owners upon the contract.

It is undoubtedly the general rule that the procurement by a broker of a mere optional contract of sale does not entitle him to recover a commission in advance of a sale, when his undertaking is to effect an actual sale. This is held by courts generally, and has been repeatedly held by this court. *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350; *Jones & Co. v. Eilenfeldt*, 28 Wash. 687, 69 Pac. 368; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Neely v. Lewis*, 38 Wash. 20, 80 Pac. 175. But the rule, we think, is without application to a case presenting facts such as are presented in the case at bar. Here the brokers were not permitted to complete the negotiations pending between themselves and their customer. The owners took the burden of the negotiations upon themselves, and, without consulting the brokers, entered into a contract of sale of the property with the customer, thereby not only preventing a sale by the brokers to the particular customer, but preventing a sale to the other customer with whom they were authorized to deal. The owners are thus estopped from asserting that the brokers did not furnish a customer ready, able, and willing to take the property on the terms under which they were authorized to make a sale.

Nor can the owners plead the terms of the contract as a defense of the right of the brokers to recover. The contract entered into for the sale of the property was not the brokers' contract. It was the contract of the owners, with the terms

of which the brokers had nothing to do. It may or may not have been the best or only contract the purchaser would enter into. This issue has been placed by the conduct of the owners beyond the possibility of proof; for, conceding that an optional contract is the best and only contract that the owners could make with the purchaser, it by no means follows that the brokers could not have made an actual sale to him on the terms under which they held the property for sale, or on terms satisfactory to the owners. This could only be determined by allowing the brokers to proceed with the negotiations, which privilege the owners, for their own purposes, took away from them. To allow them now to plead the contract as a defense to the right of the brokers to recover, would be to allow one to plead his own independent conduct as a defense to the lawful claims of another. The owners could not make a contract with the brokers' customer so as to defeat their claim for commissions until after the brokers themselves had concluded their negotiations with him. The language of the court in *Lawson v. Black Diamond Coal Min. Co.*, 53 Wash. 614, 102 Pac. 759 (quoting from *Chilton v. Butler*, 1 E. D. Smith (N. Y.) 150), is applicable here:

"If vendors were permitted to employ brokers to look up purchasers, and call the attention of buyers to the property which they desired to sell, limiting them as to terms of sale, and then, while such purchasers were negotiating, take the matter into their own hands, avail themselves of the labor, services and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing; gross injustice would be done; every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent."

See, also, *Peterson v. St. Francis Hotel Co.*, 61 Wash. 378, 112 Pac. 347. Our conclusion is, therefore, that the court erred in granting a nonsuit for either of the reasons stated.

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Since the cause must go back for a new trial, it is necessary that we notice certain other questions suggested at the argument. The appellants founded their cause of action upon the original contract, and alleged that the purchase price was \$150,000 on which they were entitled to a commission of \$87,500. The actual terms of the contract with Harrison, and the subsequent contract evidenced by the letter, appeared in the answer. The answer also set forth facts tending to show that the appellants were not entitled to recover on the subsequent contract. The reply admitted a subsequent contract as alleged, but averred that it was only partially set forth in the letter of Pitman; that the additional contract was supplemental to and in addition to the original contract, authorizing the brokers to receive the sum of five thousand dollars in addition to the amounts receivable for making a sale under the original contract, but not a substitute therefor. Other facts alleged tending to show want of a right to recover were put in issue by denials. It is contended that there is here a departure in pleadings on the part of the appellants, under the rule of *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335, and that they must recover upon the original contract, if they recover at all. But we think the contention not well founded. Plainly, the appellants did not in their reply abandon their original cause of action, and attempt to recover upon another and inconsistent cause of action set forth in the reply, as was the fact in the case cited. The appellants are still maintaining that they are entitled to recover on their original cause of action. It may be that they incorrectly conceive the effect of the subsequent contract; indeed, we may say that we think they have incorrectly conceived it and that the limit of their recovery is \$5,000, but the pleadings as a whole present the entire issue, and as this is the sole and only purpose of pleadings, either party may recover to the extent the proofs warrant. Neither should be denied a recovery to this extent even though they may have claimed more.

The judgment is reversed, and the cause remanded for a new trial.

Crow, C. J., PARKER, MOUNT, and MORRIS, JJ., concur.

[No. 11990. Department Two. August 17, 1914.]

A. LINDBLOM, *Appellant*, v. DEED H. MAYAR *et al.*,
Respondents.¹

CONTRACTS—BUILDING CONTRACTS—CONDITIONS PRECEDENT—ARCHITECT'S CERTIFICATE—PLEADING AND PROOF. Where a building contract, as shown by defendants' answer in an action by the contractor to foreclose a lien thereon, provides for a certificate of completion from the architect as a condition precedent to recovery, it is the duty of the contractor to procure the required certificate or show an excuse for failure to do so, and a complaint fails to state a cause of action where it alleges employment under the contract and that the building has been completed, without alleging a demand for the certificate or that the same has been arbitrarily or capriciously withheld, or waived by the owners.

SAME—ARCHITECT'S CERTIFICATE—WAIVER. In such a case, the affirmative allegations of the answer, that the building "has never been accepted according to said contract," and a claim for damages resulting from defective construction of the building, do not waive the provision of the contract requiring the architect's certificate as a condition precedent to recovery, the former defense being, in substance, separate from the allegations of damage and not inconsistent therewith, the defendants offering no evidence in support of the damages alleged, but asserting their right to the architect's certificate both in their pleadings and again in a successful motion for dismissal at the close of plaintiff's case, thereby precluding the necessity for offering affirmative proof touching the question of damages, resulting in an abandonment of their claim for an affirmative judgment.

SAME—ARCHITECT'S CERTIFICATE—FAILURE TO PRODUCE—BURDEN OF PROOF. In such a case, the burden of proof is upon the plaintiff, not only as to the merits of his claim, but to show excuse for failure to produce the architect's certificate as to the proper completion of the building.

¹Reported in 142 Pac. 695.

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TRIAL—DISMISSAL—WITH PREJUDICE. Upon dismissing an action to foreclose a mechanics' lien for failure of the contractor to obtain the architect's certificate as required by the contract, or to plead or prove a demand therefor and a wrongful withholding by the architect, it is error for the court to enter judgment reciting ". . . and this action is hereby dismissed with prejudice," since the judgment is susceptible of being construed as a final adjudication of the right to compensation under the contract, regardless of the future ability of the contractor to obtain the certificate, or to make a showing of arbitrary or capricious refusal of the certificate by the architect.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered October 11, 1913, dismissing an action to foreclose a mechanics' lien, after a trial on the merits to the court. Modified.

Reeves, Crollard & Reeves, for appellant.

Williams & Corbin, for respondents.

PARKER, J.—The plaintiff commenced this action in the superior court for Chelan county to foreclose a lien claimed by him upon a lot and building thereon belonging to the defendants, as security for a balance due him upon a contract for the construction of the building, entered into by him with the defendants. At the conclusion of the evidence introduced in plaintiff's behalf, the defendants not having introduced any evidence, the trial court, upon motion by counsel for defendants, dismissed the case, reciting in the final judgment as the reason therefor the following:

" . . . for the reason that the plaintiff did not prior to the commencement of this suit, obtain a final certificate from the architect who had supervision of the work performed by the plaintiff for the defendant according to the contract entered into by and between the plaintiff and the defendant Deed H. Mayar; and for the reason that it was not plead or proven by the plaintiff that such certificate had been demanded and unreasonably, wrongfully or capriciously withheld by the architect . . . "

From this disposition of the cause, the plaintiff has appealed, his principal contention being that the defendants

have waived the benefits of the provisions of the contract relating to certificate by the architect as to the proper completion of the building, so as to entitle him to a decision of the superior court upon the merits of his claim without such certificate by the architect and without any showing by him of wrongful or capricious withholding of such certificate by the architect.

Appellant alleges in his complaint, in very general terms, that he entered into the contract for the construction of the building, for \$5,324, without setting out a copy of the contract or any of its terms relative to the supervision of the construction of the building by the architect or his certificates to be issued during the progress of the construction and upon completion. This is followed by allegations that the building has been completed; that certain extra work was performed by him in the construction of the building, amounting in value to \$218.25; that \$4,638.15 has been paid to him by respondents upon the contract and extra work, leaving a balance of \$904.10 due thereon, for which he prays judgment of foreclosure of his claimed lien. Appellant's complaint is wholly silent as to any facts tending to show the necessity for the architect's certificate as a condition precedent to his recovery, and also, of course, is silent as to any excuse for his failure to procure such certificate.

In their answer, respondents deny the allegations of appellant's complaint except as to the entering into the contract, the payment to appellant of the \$4,638.15; and allege, as an affirmative defense, or, it might better be said, defenses, that the contract is in writing, setting out a copy thereof, which, so far as we need notice its terms here, is as follows:

"The contractor shall and will provide all the materials and perform all the work for the erection and completion (except the heating, electric wiring and plumbing) of the Leavenworth Echo Building, to be erected on east 25 feet of lots 22, 23, and 24, Bl'k 4, town of Leavenworth, Wash., as

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shown on original plat and as shown on the drawings and described in the specifications prepared by C. Ferris White of Spokane, Wash., Architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

"It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final.

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials, shall be five thousand, three hundred and twenty-four dollars (\$5,324.00) subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds, and only upon certificates of the architects, as follows:

"85% of the work done and materials delivered will be paid for from time to time as the work progresses.

"The final payment shall be made within twenty days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

Respondents also allege, "that the said building has never been completed and has never been accepted according to the contract." Respondents also allege and claim damages as against appellant for \$853, resulting to them from defective construction of the building. While they ask affirmative judgment in this sum, it is apparent from their answer as a whole that they are entitled to it only as a set-off against the claim of appellant, and they so treated it by their motion to dismiss.

Replying to the affirmative allegations of respondents' answer, appellant admits the making of the contract as therein alleged, denies, by special reference thereto, respondents' allegation that the building "has never been accepted according to such contract," and denies all of respondents' allegations of damage resulting from defective construction of the building.

It has become the settled law of this state, as it generally prevails elsewhere, that certificates of supervising architects and engineers required by the terms of construction contracts as evidence of progress and completion of the work as conditions precedent, entitling the contractor to payment for the work, will be given full force and effect; and that the contractor will be denied relief by the courts until he procures the required certificate or shows excuse for failure so to do, such as arbitrary or fraudulent withholding thereof by the supervising architect or engineer, or by waiver of such certificate by the owner. In other words, in the absence of such a showing, the courts will not hear the contractor upon the merits of his claim for compensation. *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Wiley v. Hart*, 74 Wash. 142, 132 Pac. 1015; *Dickerman v. Reeder*, 59 Wash. 405, 109 Pac. 1060; 6 Cyc. 88.

In harmony with this view of the law, it is held that a complaint seeking recovery upon such a contract, the terms of the contract requiring an architect's or engineer's certificate being disclosed by a complaint, fails to state a cause of action, in the absence of a pleading of facts showing an excuse for failure to produce the architect's certificate. Dealing with a complaint of this character, the court of appeals of New York, in *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185, said:

"By the true construction of the building contract, the procuring by the plaintiff of the certificate of the architect that the building had been completed, was a condition precedent to his right to recover under the contract the last installment of \$6,185, for which this action is brought. To meet this condition and to show a right of action it should have been averred in the complaint, either generally or specially, that the conditions precedent had been performed, or if the plaintiff relied upon a matter excusing him from procuring the certificate, the facts should have been stated. (*Thomas v. Fleury*, 26 N. Y. 26; *Bowery National Bank v.*

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Mayor, etc., 68 id. 336; *Doll v. Noble*, 116 id. 233; *Oakley v. Morton*, 11 id. 25.) The complaint neither averred that the certificate had been procured, nor that it was unreasonably withheld. A copy of the contract containing the provision as to the architect's certificate was annexed to the complaint. The action was upon the contract, and the complainant alleged performance by the plaintiff and that the building had been substantially completed according to its terms. The contract made the architect's certificate the evidence of that fact, and the plaintiff could not recover upon an allegation of performance upon proving that the building had in fact been completed, without procuring the architect's certificate, or showing that it had been unreasonably refused, or that the defendant had waived its production."

See 6 Cyc. 93, and notes. In the case before us, however, appellant's complaint failed to disclose the fact that, by the terms of the contract, the procuring of the architect's certificate was a condition precedent to appellant's right to recover unless excused by arbitrary or capricious action on the part of the architect, or that it was waived by respondents. It seems clear to us, however, that the burden of showing such excuse or waiver rested upon appellant in this case as soon as these terms of the contract were disclosed by the record and admitted to exist, the same as if the terms of the contract had appeared in the complaint, which would have required an affirmative pleading therein of facts showing an excuse for such failure.

Now, the substance of the principal contention of counsel for appellant upon the question of respondents' waiver of the provisions requiring the architect's certificate as a condition precedent to his right to receive payments, seems to be that such waiver occurred by the affirmative allegations of respondents' answer. It seems to us that such waiver did not so occur; but that the contrary was, in substance, asserted by the allegations of the answer, setting up the contract in full, and alleging that the building "has never been accepted according to said contract." Nor do we think the waiver occurred by the allegation of damages relative to defective

construction, when taken in connection with the allegations we have just noticed, which are, in substance, a separate defense from the allegations of damage. These allegations of damage are not inconsistent with the allegation of failure of acceptance according to the terms of the contract, nor did respondents offer any evidence upon the trial in support of these allegations. Had they done so, and thus submitted to the court the entire controversy between themselves and appellant upon the merits, it might well be said that they thereby waived their right to the architect's certificate as a condition precedent to appellant's right to recover upon the merits. They asserted that right in substance in their answer, and also asserted it again in their motion for dismissal at the close of appellant's evidence, before they offered any evidence whatever. Their contention thus made being successful, it was unnecessary for them to offer affirmative proof touching the question of their claimed damages, in so far as such proof might constitute a defense to appellant's claim; and in so far as such proof might constitute a foundation for an affirmative judgment against appellant, they then abandoned, as they had the right to do, their claim for an affirmative judgment. Up to that point, there was no question before the court except the question of appellant's right to recover, apart from the question of respondents' claimed damages. Up to that point, the burden of proof was upon appellant not only upon the merits of his claim, but also upon the question of his excuse for failure to produce the architect's certificate of proper completion of the building.

Counsel for appellant cite and principally rely upon *Summerlin v. Thompson*, 31 Fla. 369, 12 South. 667; *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; and *Everard v. Mayor, etc. of New York*, 89 Hun 425, 35 N. Y. Supp. 315. A critical reading of the *Summerlin* and *Healy* cases, we think, will show that, in each of them, the whole controversy was voluntarily submitted to the court upon the merits by both parties, who ignored the question of the necessity of the

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architect's certificate until after verdict, and thereby, as was held, waived that question. In the *Everard* case, the certificate of the architect was introduced for the purpose of showing that arbitration had been had under the terms of the contract, as an affirmative defense when such defense has not been pleaded. That was not a case of failure on the part of the claimant to show the required architect's certificate, but an attempt on the part of the owner to affirmatively prove a defense he had not pleaded.

Some contention is made that the evidence introduced in behalf of appellant was sufficient to show a waiver of the architect's certificate on the part of respondents. We are of the opinion, however, that it was not sufficient to establish such a waiver, conceding it was introduced without objection from respondents' counsel.

It is contended by counsel for appellant that the trial court erred in the form of its judgment. The motion for dismissal made by counsel for respondents at the conclusion of appellant's evidence was simply this: "At this time we move that the action be dismissed for the reason . . ." The judgment, as finally entered by the court is, "that said motion be, and the same is, hereby sustained, and this action is hereby dismissed with prejudice." It is insisted that the court was in error in dismissing the action "with prejudice." We are constrained to agree with this contention, in view of the fact that the judgment is susceptible of being construed as a final adjudication of appellant's right to compensation under the contract, regardless of his future obtaining the architect's certificate, and regardless of his future showing of arbitrary or capricious refusal of the architect to furnish such certificate. It seems to us, the judgment should go no farther than to dismiss the case, especially in view of the form of respondents' motion therefor, and not attempt to adjudicate such rights as may become perfected in the appellant in the future. Conditions may arise showing that this particular action was simply prematurely brought. Whether such would

be the effect of a judgment rendered in the terms as asked for by the respondents need not now be decided. We conclude that the judgment should be corrected by striking therefrom the words "with prejudice," and, as so amended, stand affirmed. It is so ordered.

In view of this disposition of the cause, we conclude that neither party should recover costs in this court. It is so ordered.

Crow, C. J., Mount, Fullerton, and Morris, JJ., concur.

[No. 12144. Department One. August 20, 1914.]

CARL H. MANN, *Appellant*, v. R. L. WRIGHT *et al.*,
Respondents.¹

COUNTIES—REMOVAL OF COUNTY SEAT—PROCEEDINGS—REVIEW. The submission of a proposition to change a county seat being a political and not a judicial question, alleged error of the county commissioners in their conclusions as to the sufficiency of the petition because of neglect in rejecting names signed thereto, which were alleged to have been later signed to a second petition for the removal of the county seat to another place, will not be reviewed by the courts, except in case of fraud or arbitrary action, in the absence of statute giving the courts jurisdiction of such matters.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered June 29, 1914, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Affirmed.

Lester S. Overholt, for appellant.

E. D. Clough and *Peter McPherson*, for respondents.

Geo. S. Lee, *amicus curiae*.

Gose, J.—This is an action to enjoin a county seat election. A demurrer was sustained to the petition. Plaintiff has appealed.

¹Reported in 142 Pac. 697.

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Opinion Per GOSSE, J.

The suit is prosecuted by a citizen and resident taxpayer of Okanogan county, on behalf of himself and other resident taxpayers. The defendants are, respectively, the board of county commissioners and the county auditor of Okanogan county. The complaint alleges that, on the 6th day of April, 1914, two petitions were presented to the board of county commissioners of Okanogan county, "each signed by and containing the names of the qualified electors of said county, equal in number to more than one-third of all the votes cast in said county at the last preceding general election." It is further alleged that one of the petitions prayed for the removal of the county seat of Okanogan county to the town of *Omak*, in said county, and that the other prayed for the removal of the county seat to the town of *Okanogan*, in such county. It is alleged that, on the 7th day of April, 1914, the board of county commissioners made an order in reference to the petition praying for the removal of the county seat from Conconully, to *Omak*, which contains the following recital:

"Said petition having been duly canvassed and considered and it appearing to this board is signed by qualified electors of said county of Okanogan equal in number to more than one third of all the votes cast in the county at the last preceding general election, being signed by 1812 such qualified electors of said county, it is ordered that said petition be granted and that said proposition be submitted to the electors of Okanogan county at the next general election of county officers to be held on November third, 1914, and that due notice thereof be given according to law."

It is also alleged that the petition for the removal of the county seat to the town of *Omak* is illegal, in that it contains the names of several hundred persons who later signed the petition to remove the county seat to *Okanogan*, and that, if such names were stricken from the *Omak* petition, it would not contain the requisite number of names. The prayer is that the order of the board be vacated, and that the county auditor be enjoined from placing the name of the

town of *Omak* on the ballot at the ensuing general election.

The respondents joined in a demurrer upon two grounds, (1) that the court has no jurisdiction of the persons of the defendants, or either of them, or of the subject-matter of the action; (2) that the petition does not state facts sufficient to constitute a cause of action.

The procedure for the removal of county seats is contained in the statute, Rem. & Bal. Code, §§ 3832 to 3840 inclusive. Section 3832 (P. C. 123 § 1) reads:

“Whenever the inhabitants of any county of this state desire to remove the county seat of the county from the place where it is fixed by law or otherwise, they shall present a petition to the board of county commissioners of their county, praying such removal, and that an election be held to determine to what place such removal must be made: Provided, that the petition for removal shall set forth the names of the towns or cities to which such county seat is proposed to be removed.”

Section 3833 (P. C. 121 § 3) provides that, if the petition is signed by qualified electors of the county equal in number to at least one-third of all the votes cast in the county at the last preceding general election, the board must, at the next general election, submit the question of removal to the electors of the county. Section 3834 (P. C. 123 § 5) prescribes the notice which shall be given, and how the returns shall be made. Section 3835 (P. C. 123 § 7) provides that, in voting on the question, “each elector must vote for or against the place named in the petition, plainly designating same on his ballot.” Section 3836 (P. C. 123 § 9) provides that, when the returns have been received and compared and the result ascertained by the board, “if three-fifths of the legal votes cast by those voting on the proposition are in favor of any particular place,” the board must give notice of the result conformably to the statute. Section 3837 (P. C. 123 § 11) provides that the board must declare the place selected as the county seat, and that it shall thereupon be the duty of the several county officers to remove their respective offices

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and records to the county seat thus chosen.

This court has had occasion to review at length all the questions presented by the record. *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480; *Krieschel v. Board of Com'rs, Snohomish County*, 12 Wash. 428, 41 Pac. 186; *Heffner v. Board of County Com'rs, Snohomish County*, 16 Wash. 278, 47 Pac. 480. In the *Parmeter* case, a proposition to remove the county seat from Oysterville was submitted to the electors. The board of commissioners canvassed the returns and declared South Bend to be the county seat. Plaintiff, a taxpayer of Oysterville, sought to vacate the order of the board and to enjoin the county officials from transferring the county records from Oysterville to South Bend. He alleged fraud in the counting of the votes by the judges of election, and issuing fraudulent returns to the board of commissioners, but did not allege that the board of commissioners participated in the fraud. In holding that, in the absence of a statute authorizing the proceeding, the court had no jurisdiction to go behind the returns, the court said:

"If, then, the removal of the county seat is a political question (a proposition which cannot be seriously denied), the regulation and control of which under our form of government are within the exclusive jurisdiction of the legislative department, it follows from the logic of *State v. Jones*, *supra*, that the state of facts, properly certified to by the tribunal, solely empowered by the legislature to pass upon the questions involved, must be taken as conclusive. The legislature has made provisions for the determination of these facts. In these provisions it did not see fit to provide for any review or investigation by the courts, and the courts, therefore, are without authority to act in the premises."

In *Rickey v. Williams*, a petition containing 124 names was presented to the board of county commissioners of Stevens county praying the removal of the county seat from Colville to Kettle Falls. Stevens county at the last preceding general election had cast 1,038 votes. The law required

the petition to be signed by qualified electors of the county to the number of at least one-third of all the votes cast in the county at the last preceding general election, being the same statute to which we have referred. The board made the following order:

"The petition of Arthur W. Holly and one hundred and twenty-three others for an election for the removal of the county seat from Colville to Kettle Falls read, and on motion of C. K. Simpson the prayer of the petitioners granted, and auditor ordered to have notices printed and posted."

The proposition was submitted to the voters, Kettle Falls received the requisite number of votes, and the board entered an order to that effect. The plaintiffs sued to enjoin the removal of the county seat to Kettle Falls. The court held that, inasmuch as the petition upon its face showed that it did not have the number of signatures required by the statute, the submission was unauthorized and the election "held in pursuance thereof was necessarily invalid," and that injunction was the proper remedy. The court said:

"The granting of the writ in this case did not involve an inquiry into any matter which rested in the discretion of the board, nor into any disputed question of fact."

The *Krieschel* case was an action to enjoin the removal of the county seat from the city of Snohomish to the city of Everett. After the matter had been submitted to the electors, the board of commissioners entered an order declaring the result, and declaring the city of Everett to be the county seat. It was held that the board did not canvass the returns; that it did not ascertain the number of legal votes cast, and that,

"The result of the election not having been ascertained, the pretended canvass and ascertainment by the board was not merely irregular, but absolutely void, and constituted no foundation or authority whatever for the order and declaration entered upon the records."

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In the *Heffner* case, the commissioners of Snohomish county, after the decision in the *Krieschel* case, examined, compared and canvassed the election returns, and again declared the city of Everett to be the county seat. In reaching that conclusion, the board rejected certain votes appearing on the returns because it conceived them to be illegal and fraudulent. In addressing itself to the contention that the votes were erroneously rejected, the court said:

"But where the legislature have devolved upon a particular tribunal or board the duty of ascertaining, declaring and publishing the result of an election to determine a special question, such as the removal of a county seat, it would seem to have been their intention that such tribunal, and no other, should finally determine such result, and they cannot discharge their duty without exercising their judgment as to the matters to be determined. All the courts of general jurisdiction can do, in cases of this character, is to ascertain whether the tribunal or board has proceeded according to the directions of the statute defining their duties, and to declare their proceedings ineffectual and void if they have departed from such directions . . . But in this case it appears that the board, or at least a majority of its members, received and 'compared' the returns and ascertained the number of legal votes cast on the proposition and declared the result, and if they arrived at a wrong conclusion we know of no legal method whereby their act, in that regard, can be reviewed by the courts. *Parmeter v. Bourne*, 8 Wash. 45 (35 Pac. 586, 757.)"

We announced a like view in *State ex rel. McCallum v. Superior Court*, 72 Wash. 144, 129 Pac. 900, 44 L. R. A. (N. S.) 1209, in considering the provision of the local option statute, which gives "final jurisdiction" to the superior court in contests respecting the validity of local option elections.

It will appear from a reference to these cases that we have held the submission of a proposition to change a county seat to be a political or a public question; that, in the absence of a statute giving the courts jurisdiction of such matters, the courts will not interfere with the determination of the

board of county commissioners where the order of submission is fair upon its face, except in cases of fraud or arbitrary action such as was present in the *Rickey* and *Krieschel* cases. The charge in this case is, in effect, that the board arrived at a wrong conclusion because it did not reject names upon the Omak petition which, it is alleged, were later signed to the Okanogan petition. But this court has held that there is no legal redress where the board has acted and declared the result and "arrived at a wrong conclusion," except in the instances noted. In the case at bar, the signers of the petition are admittedly qualified electors in Okanogan county. The question presented to the board of county commissioners was whether the names of those who had signed the petition for removal to Omak should be stricken because they were later signed to a petition to remove the county seat to the town of Okanogan. It will be presumed that the board concluded that such names should not be stricken. Whether or not they committed error in so holding, under the rules announced in the foregoing cases, is not a judicial question.

Counsel who has appeared as *amicus curiae* argues, and cites sustaining authority from other jurisdictions to the effect, that, under our statute, Rem. & Bal. Code, § 1002 (P. C. 81 § 1729), a writ of certiorari lies to review this question. There are two answers to this contention; one is that a writ of review was not sought; and the other and broader one is that the *Heffner* case was decided more than a year after the writ of review statute took effect. It would be profitless to review the authorities cited by counsel, in view of the fact that the judgment of the learned trial court must be sustained under the decisions of this court.

The judgment is affirmed.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

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Statement of Case.

[No. 11681. Department One. August 25, 1914.]

WILLIAM W. SEYMOUR, *Appellant*, v. THE CITY OF
ELLENSBURG *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATION — ASSETS—UNPAID TAXES. There being a presumption of payment of delinquent taxes arising from lapse of time, applying alike to real as well as personal taxes, real taxes delinquent for twenty years or more cannot be considered the equivalent of cash assets in determining whether the constitutional debt limit of a city has been exceeded.

SAME—IMPROVEMENT DISTRICTS—SOLVENCY—PRESUMPTIONS. An improvement district which includes practically all the real property of a city will not be presumed insolvent, and hence in a state of bankruptcy, in the absence of evidence of such fact.

SAME—INDEBTEDNESS—LOANS TO OTHER FUNDS. Temporary loans by a city from the current expense fund to certain local improvement districts and to the water works fund, which were solvent, do not create a debt against the municipality, but may be considered as cash assets and offset against the total indebtedness in determining whether the city has exceeded its constitutional debt limit.

SAME—CLAIMS — ALLOWANCE OF — CITY WARRANTS — FAILURE TO SPECIFY PURPOSE. Rem. & Bal. Code, § 7687, providing that, upon allowance of any demand against the city, "the mayor shall draw a warrant upon the treasurer for the same, which warrant . . . shall specify for what purpose the same is drawn, and out of what fund it shall be paid," is mandatory in its requirements, and a warrant which fails to state on its face the purpose for which it is drawn creates no liability against the city, hence cannot be considered as a valid obligation in determining whether the city has exceeded its constitutional limit of indebtedness.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 7, 1913, upon findings in favor of the defendants, in a taxpayer's suit for equitable relief. Reversed.

T. L. Stiles and *A. L. Slemmons*, for appellant.

E. E. Wager, Hovey & Hale, and *Bates, Peer & Peterson*, for respondents.

¹Reported in 142 Pac. 875.

MAIN, J.—This was a suit by a taxpayer for the purpose of determining whether Ellensburg, a city of the third class, had exceeded its constitutional debt limit of one and one-half per cent, without a vote of the people. The plaintiff claims that the city had exceeded this debt limit on August 10, 1912, October 7, 1912, and July 15, 1913. Whether, on any of these dates, the debt limit had been exceeded depends first, upon what assets of the city were equivalent to cash and, therefore, subject to be offset against the total indebtedness; and second, whether certain warrants evidence an obligation of the city.

The tax rolls of the city show delinquent unpaid taxes on real estate for the years 1889, 1890, 1891, 1892, and 1893, which, together with the accumulated interest, amounted to approximately \$12,500. The city, from time to time, drew warrants on its current expense fund for the benefit of certain local improvement districts. These warrants were charged to the respective improvement district funds for the benefit of which they had been drawn. Likewise, current expense fund warrants were drawn for the benefit of the municipal water system and charged to the water works fund. There were outstanding against the city what were known as electric light warrants aggregating a large sum of money. These warrants were in form as follows:

Warrant.....	No.....
Treasurer of the City of Ellensburg, Washington.	
Pay to	or order (\$....).....Dollars,
from any Electric Light Funds not otherwise appropriated.	
Mayor.
.....City Clerk.

A detailed statement of the city's financial condition at each of the times when it is claimed the debt limit was exceeded will not be here attempted. The facts, though largely stipulated, are exceedingly complicated. There is no serious dispute as to the material and controlling facts.

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Opinion Per MAIN, J.

Law questions only will be decided upon this appeal. These questions are: First, can the delinquent taxes for the years named be considered as the equivalent of cash when computing the amount of the city's indebtedness; second, did the loans to the local improvement districts and water works fund constitute a municipal indebtedness; and third, are the electric light warrants a city liability?

I. By § 6, art. 8 of the constitution, no city is permitted to incur indebtedness in any manner in an amount exceeding one and one-half per cent of the taxable property within such city, without being authorized so to do by the assent of three-fifths of the voters. In determining whether the indebtedness exceeds the limit fixed by the constitution, this court has held that, not only current taxes, but also delinquent taxes, and the interest thereon, may be treated as cash assets. In other words, that there shall be deducted from the total indebtedness the amount of current and delinquent taxes, together with interest. *State ex rel. Barton v. Hopkins*, 14 Wash. 59, 44 Pac. 134, 550; *Graham v. Spokane*, 19 Wash. 447, 53 Pac. 714; *State ex rel. American Freehold Land Mtg. Co. v. Mutty*, 39 Wash. 624, 82 Pac. 118, 109 Am. St. 917. The reason given for this rule is that, in legal contemplation, the collection of the taxes and interest is certain and, therefore, they are the equivalent of cash.

In *Graves v. Stone*, 76 Wash. 88, 135 Pac. 810, it was held that, after personal property taxes had been delinquent for a period of six years, there arose a presumption of payment, this presumption being one of fact and not of law. In this respect, there can be no distinction between delinquent real and personal property taxes. If the lapse of time in one case creates a presumption of payment, it must likewise do so in the other. It would seem that delinquent taxes and interest against which there is a presumption of payment could not reasonably be considered as equivalent to cash when determining whether the constitutional debt limit of a city has been exceeded. In the present case, the taxes which

are claimed to be equivalent to cash had been delinquent for twenty years or more. And their collection, under the doctrine of the *Graves* case, cannot, in legal contemplation, be considered certain. It follows that these taxes cannot be considered as the equivalent of a cash asset in determining the total amount of the city's indebtedness.

II. From the stipulated facts, it appears that advancements had been made from the current expense fund to certain local improvement districts and to the water works fund. It is an admitted fact that, in all these improvement districts, the assessments had been made and were in the process of collection and that the districts were solvent, with the exception of the improvement district which provided for the water distributing system for the city. This latter district includes all the real property of the city, with the exception of a tract of land about the Northern Pacific Railway station. If this district, covering practically all the real property in the city, is not also solvent, then the municipality would be in a state of bankruptcy. Of this there is no evidence, and it will not be presumed. The water works and distributing system were owned and controlled by the city. In *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, it was held, that where the city makes temporary loans from its general fund moneys to other funds which have an assured and certain source of income, the collection of which is under the control of the city, such loans do not imperil the general fund and are not to be considered in determining the obligations of the city, for the reason that the fund out of which the temporary loan is to be paid is the equivalent of cash as a working asset. In that case it was said:

"It is next suggested that the proposed pledging of the water receipts and the transfer from the general to the special fund, will obligate the city for new indebtedness which it cannot incur by reason of the constitutional limitation upon that subject. This court has already held that the mere pledge of the water receipts as a special fund does not

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create a debt against the municipality within the meaning of the constitutional inhibition. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895. We have also seen from what has already been said that the transfer from one fund to the other creates no indebtedness against the city. It is a mere temporary loan to a fund with an assured income, whose sources of supply are entirely under the control of the city. The city's general funds are not thereby in fact reduced, inasmuch as the credit of the general fund for the temporary transfer is the equivalent of cash as a working asset, and no new debt of the city arises."

Under the rule of that case, the legal certainty that the temporary loans to the improvement districts and the water works fund will be repaid makes them the equivalent of cash. As such, these amounts may be offset against the total indebtedness in determining whether the city has exceeded its debt limit.

III. From the facts above stated, it appears that the electric light warrants which had been issued, and the validity of which was questioned, did not show, on their face, the purpose for which they were issued. Rem. & Bal. Code, § 7687 (P. C. 77 § 331), provides:

"All demands against such city shall be presented to and audited by the city council, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand, the mayor shall draw a warrant upon the treasurer for the same, which warrant shall be countersigned by the clerk, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

This section of the statute applies to municipal corporations of the third class, which the city in question is, and requires that, on the allowance of any demand against the city, the mayor shall draw a warrant upon the treasurer for the sum, which warrant shall be countersigned by the clerk and "shall specify for what purpose the same is drawn, and out of what fund it is to be paid." The warrants in question

specified the fund, but did not specify the purpose. Failing to conform to this statutory provision, are the warrants void as a municipal liability? Giving effect to the language of the statute, it would seem that this is a mandatory requirement. If warrants which do not specify the purpose are nevertheless valid, then any other requirement of the statute as to what the warrant shall contain might be omitted, and the statute practically nullified. Manifestly, the legislature intended to require that all warrants should substantially conform to this statutory requirement. The general rule, as established by the adjudicated cases, is that, where the charter or statute requires a municipal warrant to specify the purpose for which it was issued, a warrant which fails to state on its face the purpose creates no liability against the city, and is not evidence of a debt against it. *Travelers' Ins. Co. v. Denver*, 11 Colo. 484, 18 Pac. 556; *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504; *Reeve v. Oshkosh*, 33 Wis. 477. In the case last cited it was said:

"Another objection taken to the orders is, that they fail to state, as required by the city charter, the purpose for which they were drawn, and therefore create no liability against the city. This objection appears to us insurmountable. Section 1, ch. 7 of the charter (P. & L. Laws of 1868, ch. 501), provides that 'all orders drawn upon the treasury shall specify the purpose for which they were drawn, and shall be payable generally out of any funds in the treasury belonging to the city, except the school fund.' It must be admitted that the orders in the present case do not state any purpose for which the money was to be paid; nor do they conform in any manner to this provision. The language of the charter, it will be seen, is mandatory, that '*all orders shall specify the purpose for which they were drawn,*' while the orders before us contain no specification of the kind. We cannot therefore see how these orders can be said to create a liability against the city, or be evidence of a debt against it. For it can not be successfully claimed that the legislature could not direct the form and substance of the orders which should be issued by the officers of the city, and prescribe the mode in which such instruments should be drawn to render them binding

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obligations. And having plainly required that the orders should state the purpose for which they were drawn, no orders are valid unless they conform to this requirement. The counsel for the plaintiffs, however, contends that this provision of the charter is merely *directory*, which the officers of the city might observe or not in issuing orders. We are unable to take this view of the provision. As already remarked, the language is imperative and mandatory, and plainly directs that every order issued by the officers of the city shall specify the purpose for which it is drawn. The object of the requirement is to protect the public against an abuse of the power to issue orders, and to guard against the fraud and dishonesty of city officials. If the orders specify the purpose for which they are drawn, citizens interested in the expenditure of public funds can ascertain from them what application was made of all moneys which might come into the city treasury, and see whether they were devoted to a legitimate object. And the city treasurer, on the presentation of the order, has the means of knowing whether money is paid on it for an unauthorized purpose. The provision is a wise and salutary one, easy to be complied with on the part of the city authorities, and cannot be disregarded when issuing orders which create a liability against the city. For, the manifest intention of the legislature was to forbid the issuing of any order which did not state the purpose for which it was drawn."

So far as we are informed, there are no authorities sustaining the contrary doctrine. The case of *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, does not cover the question here presented. If that case has any relevancy, it lends support to the view that the statutory requirement under consideration is mandatory.

The electric light warrants, failing to state the purpose, do not evidence a city liability. Whether independent of the void warrants the warrant-holders have an enforceable claim against the city is a question not now before us, and upon which no opinion is expressed.

The cause will be remanded with direction to the superior court to proceed in accordance with the views above set forth, and take further testimony for the purpose of determining

what warrants, if any, are void as having been issued at any of the times when it is claimed the city had exceeded its constitutional debt limit.

Crow, C. J., Ellis, and Gose, JJ., concur.

CHADWICK, J. (concurring).—The court having declined to overrule the case of *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, by following it in the case of *Scott v. Tacoma*, ante p. 178, 142 Pac. 467, I concur in the result.

[No. 11763. Department Two. August 25, 1914.]

KNEELAND INVESTMENT COMPANY, *Respondent*, v.

F. C. BERENDES, *Appellant*.¹

CORPORATIONS—ACTIONS—BY PLEDGEE OF STOCK—CONDITION PRECEDENT—SEEKING REDRESS THROUGH OFFICERS. A pledgee of all of the stock of a corporation may maintain an action to cancel a subsequent mortgage upon the corporate property without first seeking redress through the corporation, the rule governing stockholders in such a case having no application to a pledgee of stock; since the pledgee, so far as control of the corporation is concerned, is a stranger thereto.

SAME—CONDITION PRECEDENT—WAIVER. To first seek redress through the corporation is not a condition precedent in an action against the corporation by a pledgee of the stock to cancel a subsequent mortgage upon the assets of the corporation, where it appears that a request upon the officers of the corporation to bring the action would have been denied.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS CONSIDERED MADE. Where the complaint, in an action by the pledgee of corporate stock to cancel a subsequent mortgage upon the assets of the corporation, failed to allege that a request upon the officers to bring the action would have been denied, but it so appeared in the evidence, the complaint will be deemed amended on appeal, under Rem. & Bal. Code, § 1752, requiring the court to treat the complaint as amended so as to conform to the proofs.

CORPORATIONS—ACTIONS—RIGHTS OF PLEDGEE. The filing of a mortgage upon the assets of a corporation, after a pledge of all the

¹Reported in 142 Pac. 869.

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stock to secure a note given to the owner as part payment of the purchase price, gives an immediate right of action to the pledgee to cancel the mortgage, as it impairs the market value of the stock, hence the complaint is not defective in failing to allege that the mortgagee intended, or was threatening, to foreclose his mortgage.

APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF. Failure of a corporation to allege payment of its last annual license fee in its complaint is an amendable defect, the proofs showing payment of the fee, under Rem. & Bal. Code, § 1752, requiring the court, on appeal, to treat the complaint as amended to correspond to the fact.

CORPORATIONS—STOCK—SALE OF—INVALID MORTGAGE—CANCELLATION—CONDITION PRECEDENT—TENDER. Where the owner of all the stock of a corporation sold the stock, receiving the first payment in cash, and a note secured by a pledge of the stock as security for the balance of the purchase price, a third party who advanced to the purchaser of the stock the money for the first payment under an agreement that he was to be secured by a lien on all the assets of the corporation purchased, has no remedy against the pledgee, who was not a party to such agreement and who may sue to cancel the mortgage given the third party, since it affected the pledgee's security; and it is not a condition precedent to such action that the mortgagee's advance was not first repaid by the pledgee, his sole remedy being against the parties who defrauded him.

SAME—FORECLOSURE OF PLEDGE—RIGHTS OF PLEDGEE. In such a case, the fact that the pledgee, subsequent to institution of its action to cancel the mortgage, obtained a decree foreclosing the lien of its pledge, under which it purchased the stock for the full amount of its demand, would not alter its position from that of pledgee to that of stockholder in the corporation, and hence destroy its right to relief as a pledgee of the stock, but its right to a cancellation of the mortgage is not affected thereby, the mortgage being an unwarranted invasion of its property rights.

EVIDENCE—DOCUMENTARY EVIDENCE—AUTHENTICATION OF CORPORATE SEAL. The admission in evidence of a stock certificate cannot be assigned as error in that the authenticity of the seal thereon was not proven, where the evidence clearly showed that the certificate bore a seal purporting to be the seal of the company, and that it was issued thereby, and was treated by the company, the officers thereof, and by the officers of a corporation to which it was pledged, as the stock of the company.

SAME—BEST AND SECONDARY EVIDENCE—OFFICIAL CAPACITY OF PARTIES. The admission of testimony of a party that he and another were duly elected and acting officers of a corporation, is not error, on the ground that it was not the best evidence and that the facts

could only be shown by the minutes of the meeting at which the election took place, where it was shown that such minutes had actually been kept, but were lost, and that diligent search had failed to locate them; since if deemed secondary evidence, a proper ground was laid for its admission.

CORPORATIONS—OFFICERS—COMPETENCY—STOCK HELD IN TRUST. A holding of stock in trust for parties is sufficient to enable them to qualify as officers of the corporation.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered November 15, 1913, upon findings in favor of the plaintiff, in an action to cancel a mortgage. Affirmed.

Moore, Wardall, Wardall & Martin, for appellant.

Frank C. Owings and Thos. L. O'Leary, for respondent.

FULLERTON, J.—This is an action brought by the Kneeland Investment Company against Joseph E. Wickstrom, The Shelton Electric Company, and F. C. Berendes, to cancel a mortgage given by the Shelton Electric Company to Berendes. From the record, it appears that the Shelton Electric Company is a corporation having a capital stock of twenty thousand dollars, divided into two hundred shares of the par value of one hundred dollars each. On February 21, 1912, these shares were owned by the Kneeland Investment Company, Delia F. Kneeland, and J. T. Orth; the investment company owning 190 shares, Kneeland 5 shares, and Orth 5 shares. On that day, the owners of the shares of stock sold the same to the defendant Joseph E. Wickstrom for the consideration of \$15,000, one-half of which was paid in cash at the time of the sale, and one year given in which to pay the remainder. For the unpaid part of the purchase price, Wickstrom gave to the Kneeland Investment Company his promissory note, and secured the same by pledging to that company the shares of stock purchased by him. At the time of the transfer, Wickstrom was president of a corporation known as the West Coast Power Company, and the cash

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payment was made from the funds of that company, which were acquired through a loan made it by Berendes. On August 6, 1912, the Shelton Electric Company executed a mortgage upon all of its property to Berendes, to secure the sum of \$7,500, theretofore loaned by Berendes to the West Coast Power Company, and which was used in making the cash payment. It is this mortgage that this action is brought to cancel. Judgment went in favor of the Kneeland Investment Company, and Berendes appeals.

The appellant first assigns error on the order of the court overruling his demurrer to the complaint. Four principal contentions are made under this head, the first of which is that it is not alleged in the complaint that the respondent made any attempt to have the wrong which it sues to correct remedied by officers or trustees of the corporation prior to the institution of the suit. The rule which requires a stockholder in a corporation to seek redress for wrongs, committed against his interests by the officers of the corporation, through the corporation itself, before he will be permitted to maintain an action in the courts therefor, is cited in support of the contention. But while the rule itself is well established, we think it has no application to the facts here presented. The respondent was neither a creditor nor a stockholder in the corporation. The obligation owing it was the obligation of a third person, not the obligation of the corporation. And while it held all of the capital stock of the corporation, it held it in pledge, merely, not in such manner as gave it the right to exercise a voice in the conduct and management of the corporation. In so far as the control of the corporation is concerned, the respondent was a stranger thereto. It, therefore, has the same rights with reference to wrongs committed against it that any stranger to the corporation would have, and is not compelled to seek redress, in the first instance, through the corporation.

This rule was applied by the supreme court of Minnesota in the case of *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261,

276, and by the supreme court of Georgia in *Andrews Co. v. National Bank of Columbus*, 129 Ga. 53, 58 S. E. 633, 121 Am. St. 186. In the former case it was said:

"It is also contended by the defendant's counsel that the plaintiffs have no standing in court, because a stockholder, as such, could not sustain an action of this kind. It is an answer to this to say that, as remarked by the counsel in another part of his brief, the plaintiffs, though they hold the stock, are not stockholders, but pledgees merely, and therefore they cannot exercise the control over the association which stockholders can. What the stockholders may compel the association to do, they cannot compel it to do. They cannot, therefore, be required to act through the association, but may bring an action on their own account, and in their own names, to protect their rights and interest as pledgees."

But if it were conceded that the pledgee stood in the shoes of the pledgor of the stock, and was subordinated to the rights of the pledgor with reference to the maintenance of an action, such as the one at bar, there is another principle on which the order in question may rest. There is an exception to the rule contended for by counsel as well settled as the rule itself, namely, that, where it appears from the allegations and proofs that the making of a request upon the officers of the corporation to bring the appropriate action would be useless, the requirement is dispensed with. In this case, while it was not specifically alleged in the complaint that such a request would have been denied, it abundantly so appears in the evidence. The defect in the complaint in this particular was, therefore, an amendable defect, and at this stage of the proceedings we would be required, in virtue of the statute, to treat the complaint as amended so as to conform to the fact. Rem. & Bal. Code, § 1752 (P. C. 81 § 1255).

The second contention that the complaint is fatally defective, is founded on the fact that it is not alleged that the mortgagee intended to, or was threatening to, foreclose his mortgage. But the mortgage appeared valid on its face, and proof of extrinsic circumstances was required to show its in-

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validity. As such, it materially impaired the value of the shares of stock the respondent held in pledge, preventing their transfer for their actual value. A right of action, therefore, accrued upon the filing of the mortgage, and an action begun before the holder of the mortgage attempted to enforce it could not be premature.

With reference to the third contention, counsel say:

"It was averred that appellant Berendes advanced the sum of \$7,500 to Wickstrom with which to make the first payment on the stock and that it had received the same, but it was not shown that appellant took the mortgage with notice of respondent's pledge or knew that the money had not been properly applied. Before respondent asks equity to set aside the mortgage for want of consideration it should first do equity by tendering back our money.

"This court, in the case of *Spokane v. Amsterdamsch, etc.*, 22 Wash. 173, held that no duty devolves upon the mortgagee to see to the application of its loan beyond the payment to its mortgagor, and a shareholder of the corporation or pledgee who has received or partaken of the fruit of such illegal distribution cannot reasonably invoke equity to restore the property, when he has a part of the money received for the property.

"In the case at bar, respondents received our money representing for all practical purposes a distribution of part of the capital of the Shelton Company among its shareholders, although as a matter of fact respondent was the beneficial owner of the Shelton Company's assets by reason of its being the owner of its capital stock."

If we have correctly gathered the meaning of counsel, they here assume that the loan made by the appellant to the corporation represented by Wickstrom, and used by him in making the cash payment on the purchase price of the stock of Shelton Electric Company, was in some manner an advancement of money for the use of that corporation, and was by the directors thereof misapplied. If such be counsel's meaning, we cannot accept it as a correct statement of the facts in the premises. The loan to the West Coast Power

Company made by the appellant was in no sense a loan to or the advancement to the use of the Shelton Electric Company. The most that can be claimed is that it was loaned for the purpose of purchasing the stock of that company, and that the appellant believed that he would be secured in the sum loaned in some manner after the purchase of such stock. But the respondent was in no way a party to that understanding; indeed, the evidence is to the effect that it had no knowledge of the source from which the money came until after the completion of the transaction. To it, the transaction was not other than an ordinary sale, and no equity intervened by which it was obligated to return the money to the appellant before it would seek a cancellation of a mortgage wrongfully given by the Shelton Electric Company which injuriously affected its security for the unpaid purchase price of the stock. The complaint, therefore, is not faulty in that it did not plead a proffer to return the money, or that there was no tender of the same into court.

The fourth contention is that there was no allegation in the complaint that the respondent had paid to the state its last annual license fee. This objection to the complaint was not called specifically to the lower court's attention, and for that reason, doubtless, no amendment of the pleadings in that particular was required. The proofs, however, show that the fee was paid, and that no incapacity on the part of the respondent to sue existed in that particular. The defect was, therefore, amendable, and, as we have before stated, since the fact was shown to exist, we are required to treat the complaint as amended to correspond to the fact.

The appellant, in his answer to the complaint, set up two separate affirmative defenses. To these, demurrers were interposed by the respondent, which the court sustained. The second and third assignments of error are based on the rulings sustaining the demurrer. The nature of the first affirmative defense can be best stated by setting it forth at length. It is as follows:

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"For a first affirmative defense defendant F. C. Berendes alleges:

"That the West Coast Power Company is a corporation organized and existing under and by virtue of the laws of the state of Washington with its principal office and place of business at the city of Seattle, King county, state of Washington; that on the 20th day of February, 1912, this defendant agreed to and with the said West Coast Power Company to advance the sum of Seven thousand five hundred dollars (\$7,500) in cash for the purpose of enabling the said West Coast Power Company to purchase the property, plant and assets of the Shelton Electric Company, it being then and there agreed that this defendant should be secured for the sum so advanced by a first lien upon the property, plant and assets of said Shelton Electric Company so to be purchased with said money; that in pursuance to said agreement he delivered to the West Coast Power Company said sum of Seven thousand five hundred dollars (\$7,500) to enable it to make the purchase aforesaid; that defendant Joseph E. Wickstrom was then and there and at all times since has been president of the West Coast Power Company; that said Joseph E. Wickstrom issued a check duly countersigned by the treasurer of said company for the said sum of Seven thousand five hundred dollars (\$7,500) so advanced and delivered the same on the 21st of February 1912 to the Kneeland Investment Company, plaintiff herein, and received assignment of certain stock certificates representing all of the capital stock of the Shelton Electric Company in the name of Joseph E. Wickstrom Co., a corporation, and said shares were transferred upon the books of said Shelton Electric Company to the said Joseph E. Wickstrom Co., at the instance of the plaintiff, and thereafter the said 197 shares of said stock were transferred by the said Joseph E. Wickstrom Co. to the West Coast Power Company same being all of the stock of the said Shelton Electric Company except three (3) shares held by the trustees thereof, each retaining one share of the same; that the said West Coast Power Company was the real party in interest and became the equitable owner of all of the stock of the said Shelton Electric Company at the time of the purchase of said stock from the plaintiff, furnishing all the money that was paid by said Wickstrom, the president and managing officer of said West Coast Power Co. to said plain-

tiff, the title to said stock having been transferred to and taken in the name of the Joseph E. Wickstrom Co. merely as a matter of convenience, said stock and the whole thereof being in the actual ownership of said West Coast Power Company. That on or about the 1st day of August, 1912, for the purpose of carrying out the said agreement and securing this defendant for the money so advanced by him the said Shelton Electric Company by unanimous vote of its stockholders and trustees authorized the execution of the mortgage mentioned in plaintiffs complaint and said mortgage was thereupon made, executed and delivered and placed of record to and for the use and benefit of the defendant F. C. Berendes for money advanced as aforesaid; that the said defendant Berendes accepted the said mortgage and note accompanying the same in good faith without notice or any knowledge whatever of any claim, right, lien or interest of the plaintiff herein in or to the stock or property of the Shelton Electric Company and that this defendant was thereby induced to accept the said mortgage and extend credit and further time for the repayment of the money theretofore advanced by him; that the plaintiff herein has wholly failed and neglected to cause to be recorded any notice of the pledge of said alleged stock mentioned in said complaint either upon the books of the company or the records of Mason County, Washington, wherein the property of said defendant corporation is situated; that plaintiff corporation well knew at the time that it dealt with defendant Wickstrom that the said Wickstrom was acting for and on behalf of the West Coast Power Company as an official thereof. That defendant Berendes in advancing said sum of Seven thousand five hundred dollars (\$7,500) did so wholly upon the faith and security of the property to be purchased and not upon the credit of the West Coast Power Company; that said company had no property upon which to base a credit and outside of said stock had or has no tangible property upon which execution can be levied; that if said mortgage be adjudged void, said defendant will lose the entire sum he advanced, to wit: the sum of Seven thousand five hundred dollars (\$7,500) and interest thereon. That he advanced said sum in good faith for the purchase of the assets of said Shelton Electric Company and that the delay in the execution of said mortgage was not through any fault of his own."

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In our opinion, the court rightly held that the facts here stated constituted no defense to the appellant's cause of action. The appellant's equities are not superior to the respondent's. If it be true that he entrusted his money to Wickstrom and the West Coast Power Company under an agreement that he should be secured by a lien on the property purchased therewith, and that these persons have betrayed the trust to his loss, his sole remedy is against them. The respondent was no party to the agreement and is not to be held charged therewith, even though it may have known the nature of the agreement. It seems to be assumed, however, that the property of the corporation is something distinct and apart from the shares of stock of the corporation, and that the pledge of the one for the purchase price does not prohibit the pledge of the other for an antecedent debt. Such is not the rule. The capital stock of a corporation has no value unless the property of the corporation be kept intact, and the pledgee of the stock, may, under all the authorities, prevent any wrongful or illegal disposition of the corporate property that will destroy the value of the pledge.

In the second affirmative defense, it is alleged that, subsequent to the institution of the present action, the respondent instituted an action to foreclose the lien of its pledge on the capital stock of the Shelton Electric Company, and obtained a decree of foreclosure in that action under which it purchased the stock for the full amount of its demand. From these facts, the conclusion is drawn that the debt of the appellant is fully paid, and the respondent's position changed from that of a pledgee of the stock to that of a stockholder in the corporation, and hence it cannot longer prosecute its action as a pledgee of the stock. But while the nature of the respondent's relation to the corporation may have changed by its outright purchase of the stock it held in pledge, its right to the relief sought is not affected thereby; it still has the right to have the mortgage removed as an unwarranted invasion of its property rights. As it had capacity to in-

stitute the action and was rightly in court until this change in condition, and is still entitled to relief from the mortgage, we can conceive no advantage in now turning it out of court, only to permit it to return and prosecute its action in another form. To do so would be only to mulct the respondent with unnecessary costs and to cast additional duties on an already overburdened court, without any useful or practical purpose or benefit of any kind.

At the trial of the cause, the respondent was permitted to introduce in evidence, over the objection of the appellant to the effect that it had not been properly authenticated, the certificate of stock issued to Wickstrom at the time of the transfer, and which Wickstrom assigned to the respondent in pledge. This certificate bore on its face what purported to be the corporate seal of the company, and was signed by one G. W. Draham, as president of the corporation, and by one Horace Fogg, as secretary thereof. The appellant assigns the admission of the certificate as error, and urges in support of the assignment that the authenticity of the seal was not proven, and that it was not proven that Fogg was secretary or that Draham was president of the corporation. The record does not disclose that any witness was asked directly whether or not the impression of the seal appearing on the certificate of stock was the impression of the seal of the Shelton Electric Company, but the evidence is clear that this was the certificate issued by the company and pledged to the respondent as security for the obligation owing it. It bore a seal purporting to be the seal of the company, and we think that the fact that it was issued by the company and treated by the company, the officers thereof, and by the officers of the corporation to which it was pledged as the stock of the company, sufficient evidence to prove its authenticity. We think, moreover, that it may be questioned whether the general words in which the objection was made suggests the precise question. At any rate, it did not suggest it to the trial judge or to counsel trying the cause for the respondent,

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else direct evidence on the matter would have been introduced, as it was a matter susceptible of proofs and the evidence was at hand.

Nor do we think there is merit in the claim that there was no sufficient evidence of the official capacity of the persons signing the certificate of stock as president and secretary. It was testified by Draham that he was the duly elected and acting president of the company, and that Horace Fogg was the duly elected secretary. The appellant's precise contention is that this was not the best evidence, that these facts could only be shown by the minutes of the meeting of the stockholders of the company at which the election took place. But it was shown that regular minutes of the meeting at which the election took place were actually kept, and that they had subsequently been misplaced or lost and that due and diligent search had been made for them without discovering them. If the evidence offered on this point should be deemed secondary evidence, clearly a ground was laid for its admission. Again, it is said that there was no proof of the competency of the persons named to hold their respective offices, that it was not shown they were stockholders in the corporation. But we think the evidence on this point sufficient also. It does not appear that any shares of stock stood in the names of either of these persons, but it appeared that the stock of the corporation was held by the Kneeland Investment Company in trust for them with other owners. This was sufficient to enable them to qualify as officers.

Finally, it is urged that there was no sufficient evidence of the pledge of the stock; the claim being that there was no evidence of its delivery to the pledgee. But without particularly reviewing the evidence on this point, we think it justifies the conclusion of the trial judge. In fact, the transfer to Wickstrom and the pledge of the stock by him to the respondent seems to have been made with the usual formalities. At any rate, it was actually delivered to, and actually

held by, the respondent in pledge until the proceedings in foreclosure were had.

We agree with appellant's counsel that the result of the case works a hardship upon their client, that he stands to lose the very considerable sum he has advanced to further the proceedings. But we think the loss was due to the acts of persons other than the respondent or the Shelton Electric Company. Their conduct seems to have been regular and aboveboard, and in the furtherance of a legitimate business transaction. The appellant's losses cannot, therefore, be visited upon them.

The judgment is affirmed.

Crow, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

[No. 11910. Department One. September 2, 1914.]

MARY MUELLER *et al.*, Respondents, v. THE CITY OF
VANCOUVER *et al.*, Appellants.¹

APPEAL—REVIEW—FINDINGS. Upon a trial *de novo* on appeal, the judgment will be reversed, where the evidence, though conflicting, preponderates against the findings.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACT—PERFORMANCE. There is a substantial compliance with a contract for a public improvement, where it appears that, while the specifications were not, in all things, literally complied with by the contractor, the changes made were by direction of the city engineer and council, the work being done under the supervision and inspection of the city, and that defects complained of were, in the main, caused by fundamental errors in the plan of the work.

SAME—ACCEPTANCE OF WORK—FRAUD—DISCRETION—REVIEW. The acceptance of work under a contract for a public improvement, upon substantial compliance therewith by the contractor, in opposition to the opinion of the property owners, does not amount to fraud; and the council having a discretion in such matters, the courts will not review their decision unless it appears that their acceptance was for

¹Reported in 142 Pac. 868.

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something not contracted for, or that defects in the work were so apparent that a presumption arises that the city had knowledge of the contractor's nonperformance of the contract.

SAME—ACCEPTANCE OF WORK—FRAUD. The action of a city council in voting to accept work under a contract for a public improvement, at a time when the protesting parties were absent, is not evidence of fraud, nor a sufficient ground for inquiry by the courts as to the motive of the council.

Appeal from a judgment of the superior court for Clarke county, Darch, J., entered August 25, 1913, upon findings in favor of the plaintiffs, in an action to restrain the assessment of property for a local improvement, after a trial on the merits. Reversed.

George B. Simpson and R. C. Sugg (Elmer L. Sugg, of counsel), for appellants.

Müller, Crass & Wilkinson, for respondents.

CHADWICK, J.—This action was brought by plaintiffs to restrain an assessment levied against property owned by them abutting Patulla avenue, in the city of Vancouver, Washington. The court found that the contractors had not complied with the specifications of the contract and that the defendant city had not exercised good faith in accepting the same. The testimony is conflicting, and we regret that we are compelled to make a finding contrary to that made by the trial judge. This is a trial *de novo*. We have carefully examined the statement of facts, and under the rule announced in the recent case of *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172, are convinced that plaintiffs have not sustained their case by a preponderance of the evidence. While the specifications were not, in all things, literally complied with, the changes were made under the direction of the city engineer and council, and the work was done under the constant supervision and inspection of the city. The testimony preponderates in favor of a finding that there was a substantial compliance on the part of the contractor.

We are convinced that the fault of which plaintiffs complain was caused, in the main, by reason of fundamental defects in the plan of the work; that is, that the city undertook to make a macadamized street with river gravel without a sufficient binder of clay or crushed rock to hold the same in place.

This case is controlled by *Morehouse v. Clerk of Edmonds*, 70 Wash. 152, 126 Pac. 419; *Hutchinson v. Spokane*, 72 Wash. 56, 129 Pac. 892; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

It is contended, and the court found, that the city authorities were guilty of a constructive fraud in accepting the work because of the time and manner in which it was accepted. There being a substantial compliance, the fact that the city accepted the work in opposition to the opinion of some of the property owners would not amount to a fraud. At best, there would be but a difference of opinion. The council having a discretion in such matters and the right to decide, courts could not review their conduct, unless, as Mr. Cooley says, in his work on Taxation, Second Edition, page 671, the authorities had contracted for one thing and accepted another; or, as was said in the case of *Haisch v. Seattle*, 10 Wash. 435, 38 Pac. 1131, the defects in the work were so open and notorious that the city must be presumed to have taken notice of the nonfulfillment of the contract on the part of the contractor.

There is another circumstance relied on to prove fraud. The council was in session during the whole evening, and this particular matter was passed on at about twelve o'clock at night, and at a time when two of the councilmen and those who were opposing the acceptance of the work had gone home. One of the councilmen who voted against the acceptance of the work was a witness and testified that he did not vote against the acceptance of the work because he believed that it did not substantially comply with the contract, but only because he felt that a vote should be taken when the

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protesting parties were present, and that, if they had been present, he would have voted to accept the work. The fact that the council voted at a time when the protesting parties were not present would be entirely insufficient to warrant a court in even inquiring into the motive of the council, nor would it raise a presumption of fraud. Interested parties must assume—if they do not courts will not assume it for them—that deliberative bodies have ways of their own, and if interested they should remain present during the whole session if matters of concern to them are likely to be considered. But if present, the protesting parties could have done no more than object. Inasmuch as they had theretofore protested to the council and to the individual members thereof, it cannot be said that their absence tainted the action of the council with fraud and that their presence would have saved the council from the aspersions of the law. Fraud must be established by clear and convincing evidence. The showing in this case does not meet this test.

The judgment will be reversed, with instructions to dismiss.

Crow, C. J., ELLIS, GOSE, and MAIN, JJ., concur.

[No. 11838. Department One. September 2, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. L. L. DYE,
Appellant.¹

CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL ON MERITS—IDENTITY OF ISSUES. The dismissing of a prosecution for rape, at the close of plaintiff's case, upon an information filed under Rem. & Bal. Code, § 2436, charging carnal knowledge of a female child between the ages of ten and fifteen years, is a bar to a second prosecution, under Rem. & Bal. Code, § 2435, charging that defendant by force and against her will, and without her consent, had sexual intercourse with a female child above the age of ten years, and about the age of fifteen years, since the charge in either information is, in effect, the same, and under which evidence of the same offense might have been admitted, the element of force being immaterial under either statute and under either information.

SAME—FORMER JEOPARDY—DISMISSAL—WAIVER—EFFECT OF DEFENDANT'S MOTION. The granting of defendant's motion for dismissal after a full hearing of the state's case, and a judgment of dismissal entered, does not constitute a consent to the discharge of the jury or waive his right to plead a former acquittal, the judgment being upon the merits and a bar to a further prosecution, although the proper practice would have been to take a directed verdict.

SAME—FORMER JEOPARDY—RELIANCE ON DIFFERENT DATES. Where the same evidence is admissible under two informations charging criminal liability covering a period of three years, the fact that a different date is relied on to prove the offense under the second information will not preclude a plea of former acquittal under the first information.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered April 9, 1913, upon a trial and conviction of rape. Reversed.

B. A. Crowl, for appellant.

John B. Slater and *J. A. Rochford*, for respondent.

CHADWICK, J.—On the 3d day of September, 1912, the prosecuting attorney of Stevens county filed an information under Rem. & Bal. Code, § 2436 (P. C. 135 § 367), charg-

¹Reported in 142 Pac. 873.

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ing the appellant with the crime of having carnal knowledge of a child. The charging part of the information is as follows:

"That within three years immediately preceding the date of the filing of this information in the county of Stevens, state of Washington, the said defendant L. L. Dye, then and there being, then and there wilfully, unlawfully and feloniously did carnally know and abuse....., a female child between the ages of ten and fifteen years, . . . by then and there having unlawful sexual intercourse with the saidcontrary to the statute, etc. . . ."

The case was brought to trial on the 13th day of November, 1912, upon defendant's plea of not guilty. A jury was impaneled and sworn, and the state put in its evidence. Having rested, counsel for defendant moved for a dismissal. After argument and consideration of the motion, it was granted, and a judgment of dismissal entered, "the state having failed to introduce sufficient evidence to support the crime charged in the information." On November 14, 1912, the prosecuting attorney filed an information charging defendant with having committed the crime of rape, under Rem. & Bal. Code, § 2435 (P. C. 135 § 365), the charging part of the information being:

"On or about February 1st, A. D. 1912, in the county of Stevens, state of Washington, the said defendant, L. L. Dye, then and there being, did then and there wilfully, unlawfully, feloniously, and by forcibly overcoming her resistance, against her will and without her consent, have sexual intercourse with one....., a female child above the age of ten years, to wit: of the age of about fifteen years, and not the wife of said L. L. Dye, . . ."

To this information, defendant interposed a plea of former acquittal, which plea was renewed at the time the jury was called and sworn to try the case, and again when the state had rested.

We think there can be no doubt that the plea of former acquittal should have been sustained, as a matter of law.

There was no question as to the identity of the parties, and although the second information was drawn charging carnal knowledge by force, the same evidence would have supported a conviction under the first information. Indeed, it is as complete a charge under § 2436 as was the first information. Defendant is charged in the first information with having, within three years last past, carnally known a female child between the ages of ten and fifteen years, she being a person other than his wife; and in the second information, with having had, within three years, sexual intercourse with a female above the age of ten years, to wit, of the age of about fifteen years "*and not his wife.*"

Crimes are known by the charging part of the information, and not by the particular name used by the pleader.

"Was the matter set out in the second indictment admissible as evidence under the first indictment, and could a conviction have been properly maintained upon such evidence? If the answer is yes, then the plea is sufficient; otherwise, it is not." 1 Wharton, Criminal Law (11th ed.), § 393.

Under either statute, and under either information, the element of force is immaterial. We have, therefore, in legal effect, the same charge, under which evidence of the same offense might have been admitted, the only open question being the immaterial one of force. The state did not offer to show any excusatory facts warranting the filing of a second information; neither illness of a juror, the prisoner, or the court, the absence of a juryman, impossibility of the jury agreeing on a verdict, or any accident that rendered a verdict impossible; or any extreme or overwhelming physical or legal necessity (1 Wharton, Criminal Law, 11th ed., § 294); admitting, but without deciding, that any of these conditions would have availed the state.

The state contends, however, that the defendant, having moved for a dismissal, consented to the judgment which was entered in the former proceeding. Many cases are cited to sustain the assertion that, where a defendant consents to an

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arrest of the trial, no jeopardy will attach. This is true and is well sustained by authority; but here there was not only a presentment, in a court of competent jurisdiction, before a jury, upon a sufficient information, but, after a full hearing of the state's case, a judgment on the merits was entered. Defendant did not consent to anything, but demanded and received the judgment of the law upon an admitted state of facts. While a proper practice would have been to take a directed verdict, in which event no question could have been raised, yet the legal effect of the motion is the same as if the proper one had been made. *State v. Hyde*, 22 Wash. 551, 563, 61 Pac. 719.

Mr. Wharton lays down a test which applies to this case:

"Test as to whether two indictments are for the same offense is the fact whether evidence necessary to support the latter indictment would have sustained a conviction under the former indictment. Testimony to sustain the second charge not being admissible to sustain the first charge, there is no former jeopardy." 1 Wharton, Criminal Law (11th ed.), p. 528, § 395.

The prosecuting attorney contends that, the jury being charged to make deliverance by verdict, nothing less than a verdict can avail defendant. He says, if a jury is discharged without rendering a verdict, there is no jeopardy.

We have already suggested that, under a practice such as prevails in this state permitting a judge to pass upon the legal sufficiency of the facts and to direct a verdict if there be no sufficient facts, a judgment on the merits is a bar. If it were not so the constitutional guarantee "that no person shall be . . . twice put in jeopardy for the same offense" (§ 9, art. 1) would mean nothing and judgments would be no protection to one charged with crime. In the case of *State v. Kinghorn*, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136, we said:

"The better rule and the one supported by the decided weight of authority is that, when the accused has been placed

upon trial in a court of competent jurisdiction on a sufficient indictment, before a jury legally impaneled and sworn, the constitutional peril has attached, and that a discharge of the jury without good cause and without the consent of the accused is equivalent to an acquittal."

See, also, 1 Wharton, Criminal Law (11th ed.), § 394. If such be the law, how much more conclusive is the judgment of the court upon the merits, and behind which a court will not go in a collateral proceeding. The case of *State v. Price*, 127 Iowa 301, 103 N. W. 195, is in point and meets the contention of the state that a different date was relied on to prove the offense under the second information. The state had made a blanket charge in the first, as well as in the second, information. Defendant was called upon to meet a charge of criminal liability covering a period of three years. Inasmuch as the same evidence was admissible under the two informations, we think, as did the Iowa court, that the former judgment,

" . . . was necessarily a finding that defendant had not had intercourse with the prosecutrix at any time during the period covered by the indictment. True, rape is not a continuing offense, but under a general charge, such as was made in this case, all acts of illegal commerce within the period of the statute of limitations might be shown; and in such cases a general verdict of acquittal is an acquittal of all. *State v. Parish*, 104 N. C. 679 (10 S. E. Rep. 457); *Proper v. State*, 85 Wis. 615 (55 N. W. Rep. 1035). But it is said that, as the state elected in the rape case to rely upon one date, and in the incest case upon another, these rules do not apply, and there was no former acquittal, nor was the defendant in jeopardy in the rape trial for any other act of intercourse than the one relied upon by the state, to wit, the one occurring on October 28th. This is a virtual concession that the doctrine of former acquittal applies, but that it only applies when the state relies upon the same and identical transactions. The concession is manifestly sound, but the qualification is not, unless all rules with reference to jeopardy are misapplied or misunderstood. A few suggestions will dispose of the fallacy involved in this contention. Sup-

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pose, after the jury had been impaneled and sworn in the rape case, and before the state had been compelled to make an election, the court had improperly directed a verdict for defendant, or had done any other act which would have entitled the defendant to a discharge, would it be contended that the defendant had not been in jeopardy as to every act or offense included within the statute of limitations? Could the state upon another trial, or upon the return of another indictment, covering the same period of time, successfully contend that, as it had made no election, there was no jeopardy as to any offense? Could it say that it intended, if called upon to make an election, to select one act, and that the second trial or the second indictment was for another? Manifestly, each of these propositions must be answered in the negative. What difference, then, does it make that upon the trial of the rape case the state did elect to rely upon a certain transaction or a certain date? None, as we think. . . . In the absence of statute, it is the general, if not the universal rule that to sustain a plea of former acquittal it need not be shown that the offenses are the same. The test sustained by all the authorities is whether or not, if what is set out in the second indictment had been proved under the first, there could have been a conviction. When there could, the second cannot be maintained; when there could not, it may be. Or, putting it in another way, and in the manner in which it is usually stated, the test is whether the first indictment was such that the accused might lawfully have been convicted under it, on proof of the same facts as those by which the second is to be sustained," citing many cases.

We find the first judgment of the court was upon the merits; and that defendant, by moving for a judgment of dismissal, did not consent to the discharge of the jury or waive his right to plead a former acquittal; for, under our constitution, as construed in the *Kinghorn* case, jeopardy attached when the jury was called to try the case. The former judgment of acquittal is a bar to a further prosecution.

Judgment reversed, and cause remanded with directions to dismiss.

CROW, C. J., MAIN, GOSE, and ELLIS, JJ., concur.

[No. 11754. Department One. September 4, 1914.]

M. D. HAYES, *Respondent*, v. HUTCHINSON & SHIELDS,
INCORPORATED, *et al.*, *Appellants*.¹

ARREST—IN CIVIL ACTIONS—RIGHT OF ARREST—STATUTES. There being no statute in this state authorizing the arrest of absconding debtors, the provisions of Const., art. 1, § 17, permitting such arrest not being self-executing, a person causing the arrest of another is liable therefor, even though the arrest be in pursuance of an order of court without or in excess of jurisdiction, and it is immaterial that the arrest may have been caused without malice and with probable cause.

FALSE IMPRISONMENT—CIVIL LIABILITY—PERSONS LIABLE. The vice president and manager of a corporation, who united in a bond for the purpose of enabling the corporation to procure the arrest of a party as an absconding debtor, is liable in damages to such party in an action for false imprisonment.

SAME—CIVIL LIABILITY—JUDGE OF INFERIOR COURT—COLORABLE JURISDICTION. A justice of the peace is not liable for the unlawful arrest of a party as an absconding debtor, under an invalid act, upon process issued by him in good faith, and without malice, the case being colorable, though not really, within his jurisdiction.

SAME—DAMAGES—MENTAL ANGUISH—ISSUES AND INSTRUCTIONS. It is not error to instruct, in an action for false imprisonment, that the damages should be compensatory only, that if the jury found that plaintiff has sustained substantial damages, by reason of his imprisonment, they might consider his mental suffering, such as anguish of mind, sense of shame, humiliation, etc., if they should find that they resulted from his imprisonment; and plaintiff's testimony that he felt his arrest as a disgrace to himself and family, warranted the jury in inferring that mental anguish and sense of shame were attributes of his sense of disgrace.

COSTS—WITNESS FEES—TIME FOR TAXATION. A motion to strike a cost bill will be granted as to witness fees not appearing upon the record of the clerk, under Rem. & Bal. Code, § 482, where the cost bill was not filed with the clerk for more than ten days after judgment.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered September 19, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an

¹Reported in 142 Pac. 865.

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action for false imprisonment. Reversed as to appellant Sawyer; modified as to costs and affirmed as to the other appellants.

Hall & Cosgrove, for appellants.

GOSE, J.—This is an action for damages for false imprisonment. There was a verdict and judgment for the plaintiff for \$250. The defendants have appealed.

The facts may be summarized as follows: The appellant Hutchinson & Shields, a corporation, commenced an action in the justice court before the appellant William Sawyer, a justice of the peace for Monroe precinct, in Snohomish county, against the respondent and his wife, for the recovery of a sum certain, for goods sold and delivered to them. The appellant Shields was then the secretary and treasurer of the appellant corporation, and the appellant Hutchinson was its vice president and manager. The appellant Shields, at the time of the commencement of the action upon the account, made and filed with such justice an affidavit charging that the respondent was about to abscond from the state for the purpose of defrauding the appellant. At the same time, the appellant corporation, acting through Shields as its secretary and treasurer, with Shields and Hutchinson as sureties, made and filed a bond, which recites that the appellant corporation has applied for the issuance of a warrant for the arrest of the body of the respondent to prevent his absconding. The affidavit and bond were made conformably to the statute on arrest and bail (Rem. & Bal. Code, § 749 *et seq.*; P. C. 81 § 309), for the purpose of enabling the appellant corporation to procure the arrest of the respondent. Upon the filing of the complaint, affidavit, and bond, the appellant William Sawyer, as such justice of the peace, issued a warrant for the arrest of the respondent, and delivered it to an officer for service, who, in obedience to its commands, arrested and detained the respondent. After charging these admitted facts, the complaint alleges that the

arrest was without authority of law, and that the respondent, by reason of the arrest and detention, has been damaged in his good name, has been humiliated and disgraced, and has suffered great mental anguish, to his damage in the sum of \$5,000. Separate demurrers upon all the statutory grounds were interposed and overruled; whereupon appellants answered and the case was tried, with the result stated.

In *Hamilton v. Pacific Drug Co.*, 78 Wash. 689, 139 Pac. 642, we held that, while § 17, art. 1, of our constitution permits the arrest of absconding debtors, its provisions are not self-executing; that there is no statute authorizing such arrest; and that, until the legislature has prescribed a procedure, an absconding debtor cannot be arrested. In addressing ourselves to the question of the liability of the party who has procured the arrest of the absconding debtor, for the purpose of enforcing a civil liability, we said:

"A person who causes the arrest of another in a civil proceeding must answer in damages, even though the arrest was in pursuance of an order of court, when the court issuing the order has exceeded its jurisdiction, or had no authority to do so. It is immaterial that the arrest may have been caused without malice and with probable cause. *Cody v. Adams*, 7 Gray 59; *Hauss v. Kohlar*, 25 Kan. 640; *Teal v. Fissel*, 28 Fed. 351; *Strozzi v. Wines*, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832."

Under the authority of that case, the demurrers of the appellants, except Sawyer, were properly overruled.

It is argued, however, that the appellant Hutchinson should not be held liable. We cannot acquiesce in this view. He was the vice president and manager of the corporation, and united in the bond for the very purpose of compassing the arrest of the respondent.

The demurrer of the appellant Sawyer should have been sustained. The affidavit alleges that the respondent has "disposed of all his property except a few small personal effects, and converted the same into money, and has purchased travelers' drafts, and is in the act of absconding from the state of

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Washington, taking all moneys and securities with the intention and for the purpose of defrauding this plaintiff." Rem. & Bal. Code, § 749 (P. C. 81 § 309), provides:

"The defendant may be arrested in the following cases:
 . . . 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

Rem. & Bal. Code, § 1790 (P. C. 287 § 179), purports to give a justice of the peace authority to issue a warrant of arrest in such cases. Public policy demands, and the better reasoned cases hold, that a judge of inferior and limited jurisdiction, such as a justice of the peace, is not liable in damages for an unlawful arrest upon process issued by him, in the absence of malice—and no malice is alleged—in a case which is colorably, though not really, within his jurisdiction. *Grove v. Van Duyn*, 44 N. J. L. 654, 48 Am. Rep. 412; *Feld v. Loftis*, 240 Ill. 105, 88 N. E. 281; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. 137; *Bohri v. Barnett*, 144 Fed. 389; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. 889; *McIntosh v. Bullard*, 95 Ark. 227, 129 S. W. 85; *Broom v. Douglass*, 175 Ala. 268, 57 South. 860, 44 L. R. A. (N. S.) 164.

In considering this question in the *Grove* case, where there had been an arrest under a statute upon a complaint which did not charge an offense, it is said:

"Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong."

In the *Bohri* case, the plaintiff was arrested under an invalid ordinance. In holding that the justice was not liable in damages for having issued a warrant of arrest, the court said:

"Every question, from the validity of the ordinance to the identity and guilt of the man standing at bar, was a ques-

tion before the magistrate; was within his duty to hear and determine; and was therefore within the general jurisdiction of his court. Clearly, then, in exercising that jurisdiction, even though erroneously, the magistrate was within the protection of the doctrine of the cases just cited."

As was said by Mr. Justice Field, in *Bradley v. Fisher*, 80 U. S. 335, an action for damages against a justice of the supreme court of the District of Columbia for striking the name of the plaintiff from the roll of attorneys practicing in that court:

"It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful."

The reasoning is equally applicable to an inferior judge. When the complaint, affidavit, and bond were filed, the first question that met the justice was the validity of the statute. The *Hamilton* case had not then been decided. The mere fact that, in meeting the situation, he decided wrong, his good faith not being impugned, does not render him liable in damages. In view of the fact that his good faith is not impugned, and that there is no charge of malice, we refrain from expressing an opinion as to whether a different rule would apply if such facts were charged.

The court instructed the jury, in substance, that the damages should be compensatory only; that, if they found that the respondent had sustained substantial damages, as distinguished from mere nominal damages, by reason of his imprisonment, they might consider his mental suffering, such as anguish of mind, sense of shame, humiliation, loss of honor, reputation, or social position, if they should find from the evidence that they resulted from his imprisonment. Re-

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spondent testified that he was not put in jail, that he was detained for two and one-half hours, and that he felt that his arrest was a disgrace to himself, his wife, and children. Counsel criticize the instruction, saying that there is no evidence that the respondent felt any mental anguish or sense of shame. If he felt that his arrest disgraced him and his family, the jury was warranted in inferring that mental anguish and sense of shame were attributes of his sense of disgrace. We think the instruction correctly states the law.

The appellants move to strike the cost bill, because the same was filed more than ten days after the entry of the judgment, and more than ten days after the entry of the order overruling the motion for a new trial. The court should have sustained the motion as to the witness fees, amounting to ten dollars, viz: McCarthy, five dollars; and Bartels, five dollars. Rem. & Bal. Code, §§ 481, 482 (P. C. 81 § 1289, 1291); *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520, 85 Am. St. 955.

The judgment is affirmed, without costs, as to all the appellants except the appellant Sawyer. The judgment is reversed as to appellant Sawyer, with costs in his favor, with directions to dismiss the action as to him.

Crow, C. J., ELLIS, CHADWICK, and MAIN, JJ., concur.

[No. 11793. Department One. September 4, 1914.]

J. C. FARRINGTON, *Appellant*, v. MICHAEL MORRIS *et al.*,
Respondents.¹

CONTRACTS—EXECUTION—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that the owner of a building did not agree with a materialman to pay his account with contractors for material furnished them and used in the building, where he testified that he made no such promise, and he was corroborated by the circumstance that he was protected by a bond, thereby precluding the probability that he would have assumed a responsibility already resting on the contractors and the bonding company.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 10, 1913, upon findings in favor of defendants, in an action on contract, tried to the court. Affirmed.

Charles T. Goodsell, for appellant.

Oscar Cain, for respondents.

GOSE, J.—This is an action by the plaintiff, a materialman, to recover the value of certain cement, sold and delivered to contractors, and used by them in the construction of a building owned by the respondents. He alleges that the respondents, the owners of the building, subsequent to the delivery of the material, agreed to pay his account. There was a judgment in favor of the plaintiff and against the contractors for the value of the material furnished, and a judgment in favor of the owners for their costs. Plaintiff has appealed.

The court found that the respondents did not agree to pay the account. In commenting upon the testimony, he said that his view was fortified by the fact that the respondents took a bond to secure them against liens upon their property, and that, in view of this fact, it was not likely that they would voluntarily agree to pay for the material.

¹Reported in 142 Pac. 867.

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The case presents a question of fact only. The respondent husband testified that he did not promise to pay for the material. He is corroborated by the important circumstance that he was protected by a bond, and it seems incredible that he would have assumed a responsibility which rested upon the contractors and the bonding company. A further discussion of the case would be profitless. We have read the abstract of the evidence, and agree with the court that appellant has not proven his case by a preponderance of the testimony.

The judgment is affirmed.

CROW, C. J., CHADWICK, ELLIS, and MAIN, JJ., concur.

[No. 11968. Department Two. September 4, 1914.]

OWEN FITZPATRICK, *Respondent*, v. T. W. NEWLAND,
Appellant.¹

APPEAL—REVIEW—VERDICT. A verdict supported by ample, though conflicting, evidence will not be disturbed on appeal.

JURY—JURY TRIAL—DISCRETION OF COURT. It is discretionary to submit the cause to a jury after setting it for trial, by consent, as a court case.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 25, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Belden & Losey (Henry R. Newton, of counsel), for appellant.

Geo. W. Belt, for respondent.

PARKER, J.—The plaintiff seeks to recover from the defendant the sum of \$1,500, as the purchase price of a crop, claimed to have been sold by the plaintiff to the defendant.

¹Reported in 142 Pac. 867.

Verdict and judgment being rendered in favor of the plaintiff, the defendant has appealed.

The only question presented, which we regard as calling for serious consideration, is as to the sufficiency of the evidence to sustain the verdict and judgment. We find in the record ample evidence, if believed by the jury, to support the conclusion reached by it, though there is serious conflict in the evidence. This prevents our interference with the verdict and judgment upon this ground, even if we were inclined to view the weight of the evidence as being in appellant's favor. *Pachko v. Wilkeson Coal & Coke Co.*, 46 Wash. 422, 90 Pac. 436; *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Shepard v. Minneapolis Threshing Mach. Co.*, 50 Wash. 242, 97 Pac. 57, 18 L. R. A. (N. S.) 239; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563.

Some contention is made that the trial court erred in trying the cause with a jury after it had been set for trial, we assume by consent, as a court case. This was, in any event, a course which the trial court had discretion to pursue. *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209; *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053.

The judgment is affirmed.

CROW, C. J., FULLERTON, MORRIS, and MOUNT, JJ., concur.

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Opinion Per PARKER, J.

[No. 12239. Department One. September 9, 1914.]

THE STATE OF WASHINGTON, *on the Relation of the City of
Olympia, Respondent*, v. I. N. HOLMES, *as City Clerk,
Appellant*.¹

COURTS—DECISIONS—STARE DECISIS—RULE OF PROPERTY. A construction placed upon the constitution, resulting in the incurring of numerous obligations on the part of municipalities, which a contrary ruling would render invalid, to the loss of innocent parties, will be adhered to as announcing a rule of property.

MUNICIPAL CORPORATIONS—DEBTS—LIMITATIONS — CONSTITUTIONAL PROVISIONS. Where voters authorizing a bonded indebtedness plainly evidenced an intent that the debt so incurred be exclusive of the one and one-half per cent limit authorized by the constitution to be incurred without assent of the voters, and without curtailing the power of the city authorities to incur debts up to that limit, and the bonded indebtedness, while not exceeding the constitutional limit of three and one-half per cent of the assessed value of property within the city at the time the debt was incurred, is now considerably in excess thereof and, together with other debts, incurred by the city without the assent of the voters, constitutes a total indebtedness exceeding the constitutional limit of five per cent of the present assessed value of property within the city, caused by a lower assessed value of property than when the bonded indebtedness was incurred, the city authorities have power to incur indebtedness within the one and one-half per cent limit at any and all times.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 13, 1914, upon the pleadings, in favor of the relator, in mandamus proceedings. Affirmed.

Frank C. Owings, W. V. Tanner, and R. E. Campbell, for appellant.

George R. Bigelow and Troy & Sturdevant, for respondent.

PARKER, J.—This is a mandamus proceeding, commenced in the superior court for Thurston county, by the city of Olympia as relator, against I. N. Holmes, its city clerk, seek-

¹Reported in 142 Pac. 1148.

ing to compel him to issue warrants in payment of certain indebtedness owing by the city in compliance with the due allowing and ordering of payment thereof by the city council. Judgment being rendered by the superior court upon the pleadings in favor of the relator, granting a writ of mandate against the city clerk as prayed for, he has appealed therefrom to this court.

Appellant refused to issue warrants in payment of the indebtedness allowed and ordered paid by the city council, upon the ground that the total debt of the city already exceeds its constitutional debt limit, measured by the last assessment made for general taxation. The decision of the superior court is rested upon the ground that the constitutional debt limit of one and one-half per cent of the last assessment, to which extent the city may become indebted without the assent of the voters, will not be exceeded by the allowance and issuance of warrants in payment of this indebtedness. The pleadings put in issue the question of these obligations being debts of necessity which the city may incur regardless of the constitutional debt limit, but the disposition of the cause by the superior court upon the ground that the city's constitutional debt limit will not be exceeded by their allowance rendered it unnecessary to hear evidence upon and determine the question of their character in this regard.

Section 6, art. 8, of our state constitution, in so far as necessary to be here noticed, reads as follows:

"No county, city, town, school district or other municipal corporation, shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness; . . ."

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The controlling facts appearing in the pleadings are, in brief, as follows: The city has a bonded indebtedness at the present time amounting to considerably more than three and one-half per cent of the total of the last assessment of property within the city made for general taxation, which indebtedness was duly authorized by the voters of the city in such manner as to render it plain that the intent was thereby to incur an indebtedness by the city exclusive of the one and one-half per cent constitutional debt limit which the city authorities might incur without the assent of the voters, and without in any manner restricting the power of the city authorities to incur debts of the city up to the one and one-half per cent limit. Indeed, it has been adjudicated in the courts that such was the intent of the voters of the city of Olympia in authorizing this bonded debt. If this indebtedness, which the voters themselves assented to, be excluded from consideration here, it is plain from the conceded facts touching the city's financial condition that the other indebtedness already incurred by the city authorities, together with the obligations here involved, will fall considerably short of equalling one and one-half per cent of the last assessment of property within the city made for general taxation. This bond indebtedness we may, for present purposes, regard as all valid and as not exceeding three and one-half per cent of the assessed value of property within the city at the time it was incurred, though this may not be strictly true. However, this bond indebtedness exceeds, by a considerable sum, three and one-half per cent of the present total assessed value of property within the city, and if now added to the other debt already incurred by the city authorities by virtue of their power to incur debts without the assent of the voters, the result will show a total indebtedness of the city amounting to considerably more than five per cent of the present assessed value of property within the city.

It is contended by counsel for appellant that, since the total debt of the city now exceeds five per cent of the present

assessed value of property within the city, caused by the present assessed value of property within the city being less than at the time of the incurring of this bonded debt by assent of the voters, the city authorities have no power to incur further indebtedness within the one and one-half per cent limit, though the present debt incurred by them without the assent of the voters falls far short of the one and one-half per cent limit. In other words, that to whatever extent this bonded debt incurred with the assent of the voters exceeds three and one-half per cent of the present assessed value of property within the city, to that extent the one and one-half per cent limit of indebtedness which the city authorities may incur under ordinary circumstances without the assent of the voters is curtailed. Counsel for respondent contend that, in view of the intent of the voters, in incurring this bonded debt, not to in any manner curtail the power of the city authorities to incur debts within the one and one-half per cent limit, the power of the city authorities in that regard should be measured wholly independent of this bonded debt incurred with the assent of the voters.

In *Hazeltine v. Blake*, 26 Wash. 231, 66 Pac. 394, reviewing former decisions of the court touching the question of the separateness of these limitations where it is evident that the debt incurred with the assent of the voters is not intended to curtail the power of the city authorities to incur debts within the one and one-half per cent limit, Judge Fullerton, speaking for the court, said:

"It is contended by the appellant that every debt of a municipality, no matter by what authority incurred, must be taken as a part of the first limitation, and that if these debts equal one and one-half per centum of its taxable property, the municipality is without power to incur a further indebtedness without the assent of the voters. As sustaining this contention the case of *Hunt v. Fawcett*, 8 Wash. 396 (36 Pac. 318), is cited and relied upon. While in the course of the opinion in that case some language was used which would seem to support the appellant's claim, the case was said in

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the later one of *State ex rel. Barton v. Hopkins*, 14 Wash. 59 (44 Pac. 134, 550), not to lay down the doctrine contended for. It was there held that a bonded debt of a county, incurred with the assent of the voters for the purpose of building a court house, had no relation to the one and one-half per centum of indebtedness then owing by the county, or which might thereafter be incurred by it within that limitation; the court saying that whether an indebtedness incurred with the assent of the voters of a municipality was to be treated as an indebtedness belonging to its first or second limitation must be determined by the intent which is made to appear by the ratification of the proposition submitted, and that this intent must be gathered from the form of the proposition interpreted in the light of the facts existing at the time of the submission. This case was cited with approval in the still later case of *Graham v. Spokane*, 19 Wash. 447 (53 Pac. 714); and, while no discussion of the precise question was entered upon in the opinion, the effect of the decision was to affirm the proposition that an indebtedness could be incurred by a city which should remain independent of its one and one-half per centum limitation. The wisdom of this construction of the constitution we do not now feel called upon to discuss. It must be adhered to as announcing a rule of property. On the faith of this construction many debts have been incurred by municipalities which the contrary rule would render invalid, to the loss of innocent persons who have every moral right to be protected."

State ex rel. Strahorn v. Blake, 26 Wash. 237, 66 Pac. 396, is also in harmony with these views. The logic of these decisions, we think, must result in the affirmance of the trial judge's decision.

Our attention is called to the later decisions in *State ex rel. Zylstra v. Clausen*, 66 Wash. 324, 119 Pac. 797, and *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873, as tending to support the view that five per cent of the assessed value of the property within a municipality must, under all circumstances and at all times, control the limit of the municipality's power to incur indebtedness. While in those decisions the constitutional limit of indebtedness is referred to as ex-

ceeding five per cent of the assessed value of the property within the municipality, the question of determining the effect of the one and one-half and the three and one-half per cent limit separately, after a reduction in the assessed value of the property within the municipality had occurred, was in no way involved. We think these decisions are not controlling here.

We quote, with approval, remarks made by the learned trial judge in disposing of this case, as follows:

"As to the limitation in the constitution that the total indebtedness shall not exceed five per centum, it is to be noticed that, after the provision for one and one-half per centum without any popular approval, the constitution then reads: '*Nor in cases requiring such assent* shall the total indebtedness at any time exceed five per centum, etc.' by which it is clear that when the city undertakes to incur an indebtedness of that class which requires the approval of a three-fifths popular vote, it must be seen to that such indebtedness thus attempted to be undertaken shall not, together with all other present indebtedness (including that of the first class) exceed the five per centum. This view as to the five per centum limit, however, in no way militates against the independent right of the city to create obligations within the one and one-half per centum, or first classification at any and all times."

These observations, of course, are only applicable where the voters have evidenced their intent, as in this case, not to curtail the power of the city authorities to incur indebtedness within the one and one-half per cent limit.

We conclude that the judgment, directing the issuance of the writ of mandate requiring the clerk to issue warrants in compliance with the order of the city council, should be affirmed. It is so ordered.

CROW, C. J., GOSE, ELLIS, and MAIN, JJ., concur.

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Statement of Case.

[No. 12193. Department Two. September 9, 1914.]

A. U. MILLS, *Appellant*, v. W. D. NICKEUS, *as City Clerk of the City of Tacoma, Respondent*.¹

MUNICIPAL CORPORATIONS—OFFICERS—RECALL—PETITIONS—NUMBER OF SIGNERS—STATUTES—CONSTRUCTION. Const., art. 1, §§ 33, 34, prescribing the rule for determining the number of signatures to recall petitions, and providing that the number required for recall of officers of cities of the first class shall be twenty-five per cent of the votes cast "for his said office to which he was elected at the preceding election," must be construed as meaning the number of votes cast at the next preceding election held for the election of such officer (a councilman), whether the election be the one at which the councilman sought to be recalled was elected or a subsequent election; the words "his office to which he was elected," being considered as a general designation of the office held by him and his associates, the evident purpose of the provision being to determine the question of recall by the required percentage of present qualified voters.

SAME—NUMBER OF SIGNERS—TIME OF FILING PETITION. Under Const., art. 1, § 33, 34, providing that petitions for the recall of officers of cities of the first class shall contain signatures to the number of twenty-five per cent of the votes cast for all candidates for the office at the next preceding election, the percentage of signatures will be computed upon the vote cast at the election next previous to the time of filing petitions with the city clerk, although formal charges against the officer may have been filed prior to such election.

CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Where a cause has been brought before the supreme court both by writ of certiorari and appeal, counsel, by stipulation, having submitted the cause for final determination, a disposition of the cause on the appeal is the furnishing of a plain, speedy and adequate remedy, and the certiorari proceedings will be dismissed.

Appeal from, and certiorari to review, a judgment of the superior court for Pierce county, Card, J., entered July 31, 1914, dismissing an action for an injunction, after a trial on the merits to the court. Reversed.

¹Reported in 142 Pac. 1145.

Sullivan & Christian, Bates, Peer & Peterson, and Gilbert E. Peterson, for appellant.

T. L. Stiles and Frank M. Carnahan, for respondent.

H. P. Burdick and G. J. Langford, for intervener.

PARKER, J.—This is an action to enjoin the defendant, W. D. Nickeus, as city clerk of the city of Tacoma, from calling a special election of the voters of the city, to vote upon the question of the recall and discharge of the plaintiff, A. U. Mills, from his office of councilman of the city. A trial in the superior court for Pierce county resulted in judgment denying the relief prayed for by the plaintiff, dissolving the temporary injunction issued against the defendant, and dismissing the action. From this disposition of the cause, the plaintiff has appealed.

The council of the city of Tacoma consists of the mayor and four councilmen, each of whom is elected at large by the voters of the city. The term of office of each councilman is four years. Two councilmen are elected at each general municipal election held in April in the even numbered years. Appellant, A. U. Mills, was duly elected councilman at the general municipal election held in April, 1912. The total number of votes cast at that election for the office of councilman was 18,107. The total number of votes cast at the general municipal election held in April, 1914, for the office of councilman, was 21,231. In June, 1914, there was filed with respondent Nickeus, as city clerk and registration officer of the city, petitions signed by voters of the city, demanding the calling of a special election to determine the question of recall and discharge of appellant from office, preceded by the filing of charges against him which we shall assume were sufficient in form. These petitions were found and determined by respondent Nickeus, as registration officer of the city, to contain a total of 4,617 valid signatures of qualified voters of the city. The superior court found and determined, upon the trial of this case, that these petitions

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contained only 4,567 valid signatures of qualified voters of the city. It will be noticed, however, that the number of valid signatures to the petitions, as determined, both by the respondent as registration officer of the city, and by the trial court, furnishes a small margin in excess of twenty-five per cent of the number of votes cast for councilman at the general municipal election of April, 1912. The number of each determination, however, falls far short of twenty-five per cent of the number of votes cast for councilman at the general municipal election of April, 1914. These are conceded facts, and we think are controlling here.

The trial court rendered its decision upon the theory that the number of required valid signatures to the recall petitions is only twenty-five per cent of the number of votes cast for councilman at the general municipal election of April, 1912, at which appellant was elected councilman for the term he is now serving. This theory counsel for appellant contend is erroneous, insisting that the number of required valid signatures to the petitions is twenty-five per cent of the number of votes cast for councilman at the general municipal election of April, 1914, that election being the last preceding election for councilman held before the filing of the recall petitions with respondent as city clerk and registration officer.

The recall amendment of our constitution, being §§ 33 and 34 of article 1, prescribes the rule for determining the required number of signatures of voters to recall petitions, as follows:

"Every elective public officer in the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall . . . signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to

which he was elected at the preceding election, is filed . . . The percentages required shall be . . . city officers of cities of the first class, . . . twenty-five per cent."

Manifestly no question could arise under this constitutional provision as to what election would furnish the proper measure of the number of voters as a basis for computing twenty-five per cent thereof, to determine the required number of signatures to a recall petition, where the officer sought to be recalled holds his office apart from other officers and is not one of a class of officers of equal rank sharing equally the duties of those belonging to his class, like members of a legislative body or a board whose official actions are determined by majorities and whose elections occur at different times, by votes of the same constituency. Of course, the preceding election to fill such an office would be the one at which the officer sought to be recalled was elected, since there would be no general election during his term for the office which he holds. The proper solution of the problem here presented, however, is not so free from difficulty. The four councilmen are all of equal rank and authority, so far as their duties as councilmen are concerned. They, as councilmen, act collectively by majority vote, and not individually. We are not here concerned with their other duties, since the office of councilman only is the office to which they are elected and subject to be recalled and discharged from. It is true that, by designation of the council as a body, each councilman is assigned to certain separate executive duties, in the performance of which he is designated commissioner; but this is not the elective office from which a councilman may be recalled and discharged.

What, then, is the meaning of the words found in the constitution, "the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election," as applied to recall petitions directed against one of a class of officers of equal power and authority elected at different

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times, as appellant and his associates were elected? Must recall petitions directed against him have signatures equaling in number twenty-five per cent of the votes cast at the election next preceding the filing of the recall petitions, even though that election occurred to elect councilmen after his election to that office; or must recall petitions have signatures equalling twenty-five per cent of the number of votes cast at the election at which he was elected?

Looking to the literal meaning of the language of the constitution, aside from all thought of its purpose and spirit, we must confess the matter is not free from difficulty, though, even so viewing it, we would be inclined to hold, in applying it to this situation, that the words, "at the preceding election," mean at the next preceding election held for the election of councilman, whether that election be the one at which the councilman sought to be recalled was elected or a subsequent election. "His office to which he was elected," we regard as being a general designation of the office, held not only by him but by his associates, and as being, in effect, parenthetical. We think these words were not intended to restrict the meaning of the words "at the preceding election," the commonly accepted meaning of which is, at the last preceding election. Looking to the evident purpose and spirit of this constitutional provision, we think it is manifest that it evidences an intent to measure the number of required signatures upon a recall petition by the required percentage of the number of votes cast at the nearest preceding election, and to have the question of whether there shall be a recall election or not decided by the required percentage of *present qualified voters*, as near as that can be ascertained. Plainly the record of the last preceding election furnishes a more nearly correct measure of the present number of qualified voters than does the record of any prior election. Clearly it is in keeping with the spirit of our government by the people that, when a question of public concern is to be de-

cided by a majority or certain percentage of the qualified voters of the state or any legal subdivision thereof, it is to be decided by such percentage of the *present qualified voters as nearly as that can be ascertained.*

Having these considerations in view, we are led to the conclusion that the intent and spirit of the constitution is to require signatures upon these petitions equalling twenty-five per cent of the number of votes cast at the last preceding election held for the election of councilmen, being the 1914 election. These petitions do not contain signatures equalling twenty-five per cent of the votes cast at the last preceding election held in the city of Tacoma for councilman, which is the office held by appellant who is sought to be recalled and discharged therefrom. We conclude that the judgment of the trial court must be reversed, and the cause remanded with instructions to render judgment as prayed for by appellant, enjoining respondent, as city clerk, from calling a special election.

Some contention seems to be made by counsel for respondent rested upon the fact that this recall movement had its inception in February prior to the holding of the election of April, 1914, and for that reason, that the percentage should be computed upon the total vote of the election of 1912. The record before us does not clearly show when the formal charges against appellant were filed with the city clerk. But assuming that they were filed prior to the election of April, 1914, we nevertheless are of the opinion that the number of signatures to the recall petitions must be controlled by the number of votes cast at the election of 1914, since the petitions were filed with the clerk as registration officer after that election.

The trial court permitted certain citizens to intervene, who claimed that a greater number of valid signatures were attached to the petitions for recall than were counted and so determined by respondent as registration officer of the city.

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These claims are urged upon us here. But whatever merit there may be in interveners' contentions, as matters of law, it is plain that the counting of all the signatures which they claim should be counted would result in the total number of signatures falling far short of the number required, computed upon the basis of the 1914 election. Therefore these contentions do not call for discussion.

This cause has been brought here by writ of certiorari as well as by appeal, evidently upon the theory that counsel for appellant conceive that an appeal would not afford a plain, speedy, and adequate remedy, in the event it could not be promptly disposed of. However, upon the bringing of the record here upon both appeal and certiorari, counsel have, by stipulation, submitted the cause for final determination, and the cause having been determined upon the appeal, such determination has manifestly furnished a plain, speedy, and adequate remedy. We therefore conclude that the certiorari proceedings should be dismissed, and the cause reversed upon the appeal. It is so ordered.

Crow, C. J., FULLERTON, ELLIS, and MORRIS, JJ., concur.

[No. 11549. Department Two. September 12, 1914.]

**BIRD TIMBER COMPANY, *Respondent*, v. SNOHOMISH COUNTY
et al., *Appellants*.¹**

[Syllabus by the Reporter.]

PUBLIC LANDS — GRANTS — LIEU LAND SELECTIONS — UNSURVEYED LANDS — DESCRIPTIONS — SUFFICIENCY. Under 30 U. S. Stat. at Large, 36, authorizing lieu land selections in place of *bona fide* claims or patented lands included within the limits of a public forest reservation and relinquished to the government, the lands selected, if within the unsurveyed portion of the public domain, must be described by metes and bounds with reference to natural monuments so that they can be identified, and it is not sufficient to describe them by the government subdivisions which it is expected will apply when the government survey is extended.

SAME — GRANTS — UNSURVEYED LANDS — RIGHTS OF SETTLERS — PRIORITY OVER LIEU LAND SELECTIONS. Under 21 U. S. Stat. at Large, 140 making vacant unsurveyed public lands subject to settlement by qualified homesteaders, with preferential rights to file a homestead application upon lands settled upon and to perfect entry thereof when the surveys are extended, a settler's rights are superior to a prior lieu land selection, where the lieu land applicant failed to describe the lands by metes and bounds, with reference to natural monuments, so that the land could be identified.

SAME — LIEU LAND SELECTIONS — APPROVAL — CONFIRMATION — NECESSITY. The approval of the commissioner of the general land office of lieu land selections does not confer any vested rights in the land, where the approval was not confirmed by the Secretary of the Interior, but the executive department had decided that the approval was without authority or jurisdiction, and included the lands within a forest reserve.

TAXATION — PUBLIC LANDS — DEFECTIVE LIEU LAND SELECTIONS — VESTED RIGHTS. Where lieu land selections of unsurveyed lands were defective because of an insufficient description and the approval of the selection was without authority or jurisdiction and conferred no vested rights in the lands, the same are not subject to taxation as the property of the applicants, and a tax lien thereon will be cancelled as a cloud upon the applicants' right to make lieu land selections under the forest reserve act, the lands having meanwhile been included in a public forest reserve.

¹Reported in 143 Pac. 433.

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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered March 5, 1913, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to cancel a tax levy. Affirmed.

R. J. Faussett and Joseph H. Smith, for appellants.

J. A. Coleman, for respondent.

FULLERTON, J.—This action was brought by the Bird Timber Company, a corporation, against Snohomish county, to cancel taxes levied by that county for the year 1912, and prior years, upon certain described lands which the county contends are subject to assessment and taxation as property of the Bird Timber Company. To the complaint of the company, the county interposed a general demurrer, which the trial court overruled. The county elected to stand on its demurrer and refused to plead further, whereupon judgment was entered against it for the relief demanded. The county appeals.

In the complaint it is alleged, in substance, that, prior to the year 1909, one Jacob Goldberg applied at the United States land office for the selection of unsurveyed public lands of the United States, situated in Snohomish county, describing the land desired to be selected as the north half of section five, in township twenty-eight, north, of range ten, east of the Willamette Meridian; and that, prior to the year 1909, one Jennie V. Hayes applied at the United States land office for the selection of certain other public lands of the United States situated in the same county, describing it as parts of sections fourteen, twenty-three, and twenty-four, in township twenty-eight, north, of range ten, east of the Willamette Meridian; "that such applications to select were made under the act of Congress of June 4, 1897, being an act for the selection of lands in lieu of other lands which have been included in the forest reserves created by an order of the executive department of the United States under and by vir-

tue of authority granted by acts of Congress; that said selections were sought to be in lieu of the whole of certain lands not in Snohomish county." It is further alleged, that, on August 19, 1902, Goldberg conveyed, by deed, all the right, title, and interest acquired by him in virtue of his application, and all title and interest which he might thereafter acquire, in and to such land, to the Everett Timber and Investment Company; and that, on September 25, 1900, Hayes conveyed, by deed, all the right, title, and interest acquired by her in virtue of her application in and to the lands therein described, and all the title and interests which she might thereafter acquire in and to such lands, to the same company, and that that company had, by mesne conveyances, subsequently conveyed such title and interest to the Bird Timber Company; "but that none of said parties ever had any title to said lands, or any part thereof, or any interest therein, except such interests as they may acquire pursuant to said Goldberg and Hayes applications, and that the title to such lands is in the United States."

It is then alleged that the selections were approved on their presentation to the commissioner of the general land office of the United States, but that the Secretary of the Interior decided, with reference to an application similar to the applications in question, that such approval was without jurisdiction or effect, and that, thereupon, the commissioner suspended the applications and withheld the same from patent, and that subsequently the lands embraced within the township and ranges described were, by order of the executive department of the United States, included in the Snoqualmie national forest reserve, and are now a part of such forest reserve; "that, notwithstanding the facts aforesaid, the defendant Snohomish county, by its assessors and taxing officers, caused said land to be assessed and taxes levied thereon for several years last past," and that such taxes constitute a cloud upon the timber company's lieu land rights.

The act of Congress of June 4, 1897, under which the se-

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lections in question were attempted to be made, provided that, in cases in which a tract of land, covered by an unperfected *bona fide* claim or by patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent. 30 U. S. Stat. at Large, 36. By the acts of June 6, 1900, and March 3, 1901, the right of selection was "confined to vacant surveyed nonmineral public lands which are subject to homestead entry." 31 U. S. Stat. at Large, 614, 1037. The statutes were all repealed, save as to the right to perfect selections theretofore made, by the act of March 3, 1905. 33 U. S. Stat. at Large, 1264.

It is the contention of the appellant that the selection of the lands in question by the predecessors in interest of the present claimant, the acceptance of the lands by the government given in exchange for them, and the attempted approval of the selection and exchange by the commissioner of the general land office, vested in the persons making the selection the equitable title to the lands selected, and that the United States now holds the property in trust for such persons, or their successors in interest, and can be compelled to convey such property to the person entitled thereto, when the same is surveyed and becomes subject to patent; and that they are, for that reason, taxable under the laws of the state.

But in our opinion the facts shown by the complaint do not justify this conclusion. In the first place, we think the description of the property contained in the selections is insufficient to designate any specific tract of property. At the time the selections were made, there was not, nor is there now, any specific tract of land marked on the ground which can be located by the descriptions contained in the selections. It may be that, in the course of time, the government will survey certain lands, and denote them in the surveys in ac-

cordance with the descriptions in the selections contained in the Hayes selection, but it is reasonably certain it will not designate any tract in accordance with the description contained in the Goldberg selection. This tract, if the present system of surveys is pursued, will border on a township line and will, in all probability, be fractional in quantity, in which case it will be described in part by lot numbers, instead of the general description contained in the selection. But, be this as it may, there is no means of ascertaining prior to the actual government surveys what specific tracts of land will be included in the descriptions. It is true that the act first cited allowed lieu selections to be made on unsurveyed public lands. But to be effective as to particular tracts, they must have been made by metes and bounds, with a description having a beginning point at some natural or artificial monument which could be readily and definitely located on the ground. *F. A. Hyde*, 40 Land Dec. 284.

In the second place, if it be conceded that the descriptions are sufficient to vest some right in the selectors, and it be conceded that the government will, at some future time, mark and designate certain tracts of land with the descriptions contained in the selections, there is no certainty that the selectors or their successors in interest will be allowed to patent the specific tracts claimed. By the act of May 14, 1880 (21 U. S. Stat. at Large, 140) the vacant unsurveyed public land of the United States is made subject to settlement by any person qualified to claim land under the homestead laws, and such person is given by the act a preferential right to file a homestead application on the lands so settled upon, and to perfect an entry thereof as soon as the surveys are extended over them. As the description in the applications in question is indefinite as to the land selected and were marked in no other way, the applications can and may be defeated by actual settlements on the land by *bona fide* homestead claimants made subsequent to the dates of the selections and

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prior to the extension of the public surveys over them. As was said by acting secretary Adams in *F. A. Hyde, supra*,

"A person owning land within the limits of a public forest reservation was not bound to relinquish it to the Government. He might still own, hold, and enjoy it. He was not bound to accept the invitation extended by that act to make such relinquishment, but when he did so he was bound, not only by the terms of the act but by the limitations upon its benefits imposed by other laws. He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their nonmineral character and nonoccupancy concurrent in time with the selection, he might have completed title thereto without delay; but if he selects unsurveyed lands it is a matter of his own choice and made at his own risk. It may be that the risk might have been reduced to the minimum by such description in making the selections as would have identified the lands as a then present fact, but where such identification was not made the selector necessarily takes the risk of their being or becoming occupied adverse to his selection before the approval of the township plat of survey, which, no matter what may be the application of the doctrine of relation in such cases, is the first identification of such land. Such identification previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any character. The United States are sovereign and the sovereign makes his own surveys. . . .

"The mere fact that the act provides for the selection of vacant land open to settlement is conclusive upon this proposition. If it were not open to settlement, it was not subject to selection; but being subject to selection it was still, unless identified in fact, open to settlement under the act of May 14, 1880, *supra*, and might be under the provisions of that act appropriated adversely to the selector at any time before the approval of the township plat of survey. Such approval was an identification of the land as of that date, and by relation as against the Government as of the date of the proffers of exchange, but it did not and could not so attach as to cut out intervening adverse settlement claims. This thought receives additional support in the proviso of the act relating to cases of unperfected claims upon the lands relinquished and requiring the laws respecting settlement, resi-

dence and improvement, etc., to be complied with on the new claims, credit being allowed for the time spent on the relinquished ones. In cases of this sort the selector could without fear of jeopardizing his selection make it of unsurveyed land, because he would be required to settle, reside upon and improve such unsurveyed land and this residence, settlement and improvement would be notice to the world of his claim which would fully protect him until the filing of the township plat of survey, when he would be permitted to make entry thereof and complete title under the further terms of said act."

See, also, *DeLong v. Clarke*, 41 Land Dec. 278.

The appellants argue, however, that the right of the selectors to the lands became vested by reason of the approval of the selections by the commissioner of the general land office. But it also appears that the approval was made without authority or jurisdiction, and that the lands were subsequently, by order of the executive department, included in a national forest reserve. Whatever effect the approval might have had, had it been subsequently confirmed by the secretary of the interior, it cannot now have the effect of vesting in the selectors any vested interest in the lands selected.

We are clear, therefore, that neither the selectors nor their successors in interest have any taxable interest in the property in question, and that there is no error in the judgment of the court in so far as it so decides.

The judgment will stand affirmed.

Crow, C. J., PARKER, MOUNT, and MORRIS, JJ., concur.

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[No. 11827. Department One. September 12, 1914.]

ANNA MICKELSON, *Respondent*, v. GEORGE W. FISCHER *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—DUTY TO STOP, LOOK AND LISTEN—INSTRUCTIONS. It is not error for the court to instruct the jury that a pedestrian is not required to stop, look, and listen when about to cross or when crossing a city street, and that failure to do so does not constitute negligence, but that the pedestrian is bound to use care for his safety commensurate with the attendant circumstances.

SAME—COLLISION WITH AUTOMOBILE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether plaintiff, run down by an automobile, was in the exercise of due care in attempting to cross to the opposite side of the street on alighting from a street car, after looking and seeing no vehicles, and whether defendant was negligent in passing around the rear end of the street car to pass it on the wrong side of the street, are questions for the jury, since plaintiff was not bound to anticipate the approach of vehicles on the wrong side of the street, but had a right to rely on an observance of the law of the road requiring vehicles to travel on the right-hand side of the street, the defendant, however, having a lawful right to the use of the left-hand side of the road if the travel thereon is not such as to make his conduct a source of danger.

SAME—LAW OF ROAD—INSTRUCTIONS—APPEAL—HARMLESS ERROR. An instruction, in an action for injuries to a pedestrian struck by an automobile, that "if the defendant, at the time of the injury, was violating an ordinance of the city by being upon the left-hand side of the street and was guilty of negligence, yet if the plaintiff, at the time of the injury was also violating an ordinance of the city by being unlawfully upon the part of the street where the automobile had the prior right, and was guilty of negligence, and the negligence of both plaintiff and defendant was a proximate cause of the injury to plaintiff, then plaintiff cannot recover," is not prejudicially erroneous as charging negligence *per se*, when considered as a whole, the court evidently intending to follow the thought, theretofore expressed, that the defendant might, under proper circumstances, drive on the left-hand side of the street, but that he might be guilty of negligence in so doing.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions sufficiently covered by the instructions given.

¹Reported in 142 Pac. 1160.

MUNICIPAL CORPORATIONS—STREETS—USE OF AUTOMOBILES—VIOLATION OF ORDINANCE—NEGLIGENCE. It is negligence *per se* to drive an automobile on a city street at an excessive rate of speed and in violation of an ordinance defining the law of the road as applied to city streets.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$8,500, for injuries sustained through being struck by an automobile, is excessive and will be reduced to \$5,000, where it appears that plaintiff, thirty years of age, suffered slight physical injuries about the back and limbs, possibly causing a retroversion of the womb, was confined to her room about six weeks and suffered a severe nervous shock which has persisted, that she suffers pain along her spine and a tenderness in the abdomen and in the lumbar region of the back, and is anemic and suffers insomnia, but has no organic trouble, that, at the time of the injury she earned \$15 a week as a tailor's finisher, but at the time of the trial had been out of work for seven months and had spent \$50 for medicine, and that she refused hospital treatment, which would probably have been beneficial.

TRIAL—EXCESSIVE VERDICT—DUTY OF JUDGE. It is the duty of the trial judge to pass upon the amount of the verdict, on motion to reduce the same on the ground of excessiveness, instead of leaving the question to be decided by the supreme court.

Appeal from a judgment of the superior court for King county, Humphries, J., entered September 22, 1913, upon the verdict of a jury rendered in favor of the plaintiff for \$8,500, for personal injuries sustained by a pedestrian struck by an automobile. Reversed, unless \$3,500 is remitted.

Alexander Dickinson and Peters & Powell, for appellants.

Brightman, Halverstadt & Tennant, for respondent.

CHADWICK, J.—On the 15th day of December, 1912, at about five o'clock in the evening, plaintiff got off a south-bound street car at the intersection of Westlake avenue and Denny Way, in the city of Seattle. The car was of a type known as a "single ender," that is, the exits, front and rear, faced the right curb so that it was impossible for a passenger to alight on the side next to the parallel street car track. Plaintiff stepped off the front end of the car, looked back toward the rear end where passengers were alighting

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from and entering the car, and seeing no vehicles, passed rapidly from the front end of the car toward the opposite side of the street. She had gone but a short distance when she was struck by the rear fender of defendants' machine and thrown to the pavement. She was pushed a few feet by the rear wheel of the machine, which had caught her dress, holding her helpless to protect herself.

Defendant's version of the accident is that he was coming south on the right-hand side of Westlake avenue; that when his machine came up to the street car, which had stopped and was discharging and taking on passengers, his chauffeur cut around the rear end of the street car to the left, intending to pass it on the off side. Just as the machine passed the rear end of the street car, plaintiff came rapidly, and without attention to her own safety, within the range of the lights on his machine; that both brakes were put on and the machine was steered further to the left; that the setting of the brakes and the turn of the machine to the left caused it to skid; that it turned nearly around, and in so doing plaintiff was struck down, caught by her clothing and pushed along, whether a greater or lesser distance, in substantially the same manner as is testified to by plaintiff and her witnesses. That the automobile was exceeding the speed limit as prescribed by ordinance seems to be admitted, but whether it was otherwise going so fast that it could not be readily controlled, and whether a horn was sounded and the lamps were lit and in order, are disputed facts. The case went to trial upon general denials and a charge of contributory negligence. From a verdict in the sum of \$8,500, defendants have appealed.

The first assignment of error is that the court instructed the jury that the law does not require a pedestrian to stop, look and listen when about to cross or while crossing a city street, but that plaintiff was bound to use ordinary care, and although the jury found that she did not stop, look or listen,

that that fact would not necessarily constitute negligence on her part.

We have frequently said, and it is what every one knows, that cases of this kind speak their own law. There is no positive duty to stop, look and listen when about to cross a city street, although the circumstances attending may be such as to charge a pedestrian with contributory negligence if he does not. Or, to state it in another way, the pedestrian is bound to use due care for his own safety, the measure of that care being dependent upon the attendant circumstances. The last expression of the court upon this phase of the case is to be found in *Beeman v. Puget Sound Traction, L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087. When applied to the facts, we find no error in the court's instructions.

Plaintiff was not bound to anticipate a car or other vehicle coming south on the left-hand side of the street. There are certain rules or laws of the road the observance of which, or reliance upon, become instinctive. The care of a pedestrian situate as plaintiff was would be to look to her right for cars or vehicles, relying upon the fact that traffic upon that side of the street would be from that direction. Defendant undertakes to distinguish the case of *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341, and *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892. In the one case, it is said the pedestrian looked up and down the street. In the *Lewis* case, counsel say that the pedestrian was in full view of the driver of the automobile, that the driver could watch his movements and direct his machine accordingly; whereas, in the case at bar, it was dark, the driver could not see the course taken by the pedestrian, and as soon as he did see her, he applied the brake. The fallacy of this argument lies in this: that the reason defendant did not see plaintiff is that the street car intervened and a thing happened which in law he was bound to anticipate, that is, that the street crossings would be used by pedestrians when cars are not passing or are stopped to discharge passengers; and, by the same rea-

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soning, the thing happened which plaintiff was not bound to anticipate, that is, a vehicle coming at from ten to twelve miles an hour on the wrong side of the street. Defendant was in the wrong place; he was not obeying the law of the road as it applies to crossings in city streets. In *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876, we held that a person may lawfully use what is to him the left side of the road, with the qualification—and defendant's case falls squarely within it—"if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger." Under the circumstances, it was clearly for the jury to say whether defendant was negligent and whether plaintiff was exercising due care for her own safety.

Although the jury were instructed that defendant might be on the left-hand side of the road under such conditions as are enumerated in the *Segerstrom* case, it is earnestly contended that defendant has been prejudiced by the addition of the following:

"But if the defendant at the time of the injury was violating an ordinance of the city by being upon the left-hand side of the street and was guilty of negligence, yet if the plaintiff at the time of the injury was also violating an ordinance of the city of Seattle by being unlawfully upon the part of the street where the automobile had the prior right, and was guilty of negligence, and the negligence of both plaintiff and defendant was a proximate cause of the injury to plaintiff, then the plaintiff cannot recover."

Defendant finds in the italicized words a charge of negligence *per se*. We do not so read the instruction, which must be considered as a whole. The trial judge evidently intended to follow the thought he had just theretofore expressed, that is, that defendant might, under proper circumstances, drive on the left-hand side of the street, but might in so doing be guilty of negligence. We understand the instruction in that way, and will presume that the jury understood in the same way.

Counsel for defendant requested instructions covering the doctrine of reciprocal rights, which were refused by the court. The instructions given by the court sufficiently cover this phase of the case, and there was no error in refusing to instruct in the form and manner requested by counsel.

There was ample evidence to sustain a finding that defendant was violating the ordinances of the city defining the duties of drivers of automobiles. This has been held to be negligence *per se*. *Anderson v. Kinnear*, 80 Wash. 638, 141 Pac. 1151; *Hillebrant v. Manz*, *supra*; *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903. We will not further discuss that phase of the case.

Finally, it is contended that the verdict, \$8,500, is so excessive as to indicate passion and prejudice on the part of the jury. Plaintiff was thirty years old; her physical injuries were slight; no more than some bruises about the back and limbs. Her menstrual period, two weeks past, recurred within the next day or two. It is possible that a retroversion of the womb can be attributed to the accident. She was confined to her room about six weeks, and has since been up and about the house. She suffered a severe nervous shock which has persisted. She suffers pain along her spine, and a tenderness in the abdomen and in the lumbar region of the back. She is anemic and suffers from insomnia. There is no organic trouble. Her heart, kidneys and liver and lungs are sound. Her condition is described as traumatic neurasthenia. It is said that it is not a disease but a condition erratic in its workings, but, nevertheless, fixed in the mind of the patient. At the time of the injury, she was earning \$15 a week as a tailor's finisher, and at the time of the trial had been out of work for about seven months and had spent about \$50 for medicine. Plaintiff refused hospital treatment, where, under proper nursing and more hopeful influences, she might have been benefited. She has done nothing to remedy her physical ailment, the prolapsus of the uterus. That infirmity might be treated either by the use of tampons or presseries,

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or by a simple surgical operation, the cost of which would be about \$250, and from which 65 per cent to 75 per cent of all cases completely recover. That such treatment would in all probability benefit plaintiff seems to be agreed upon by the medical men.

There is a duty resting upon every one who seeks to recover damages to minimize the amount to be measured in dollars and cents. An allowance of damages in cases of traumatic neurasthenia touches the border of speculation at best, and it is manifestly unfair for one who seeks a recovery to put a defendant to the hazard of a further speculation by refusing the aids which science affords and which are available, or by postponing the time of treatment until after a trial and a verdict.

The trial judge must have had no doubt that the verdict was too large. Otherwise he would have denied the motion to reduce it without comment or with a finding that he thought it to be just. We had the same situation in the case of *Magnuson v. MacAdam*, 77 Wash. 289, 137 Pac. 485, where we said:

"At the time of passing upon appellants' motions for a new trial and for judgment *non obstante*, the trial judge was informed by appellants that they would appeal this case in any event, if their motions were denied. Thereupon, the trial judge in substance stated that he would not pass upon the amount of the verdict to determine whether it was excessive, but would permit that question to come before this court in connection with other questions that might be raised on an appeal. It was the duty of the trial judge to pass upon appellants' contention that the verdict was excessive. His position indicates an impression or belief on his part that the verdict was excessive. We are convinced that it was, and conclude that the respondent must either consent to a reduction, or submit to a new trial."

In this case, "the court said (this part of the record is in the third person) that he would rule against defendants on both motions (motion for judgment *non obstante* and a mo-

tion for a new trial). As to the excessiveness of the verdict, however, he declined to express an opinion, stating that he would allow that question to be passed upon by the supreme court."

Now it is plain that it is the imperative duty of a trial judge to pass upon a motion to reduce a verdict. The power of an appellate court to give an option to take a reduced amount or submit to a new trial is now well established. It is made to rest upon the principle that it is within the power of the court to do justice when it appears that the damages allowed are so disproportionate to the injuries sustained as to indicate that the jury acted through passion or prejudice. Appellate courts have been criticized for exercising this power, and it has been said by some that it is an usurpation of the functions of the jury. The trial judge must have been so impressed with the belief that it was the unquestioned privilege of this court to reduce the verdict or order a new trial that he has evidently overlooked the duty imposed upon him by statute when he passed the amount of the verdict up to this court.

If, within thirty days after the remittitur goes down, plaintiff will file a remission of all above \$5,000, the judgment will be allowed to stand. If she does not, the case will be reversed and a new trial had. Defendants will recover costs in this court.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

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[No. 11828. Department Two. September 12, 1914.]

PLOUGH HARDWARE COMPANY, *Appellant*, v. THOMAS M.
BRUCE *et al.*, *Respondents*.¹

TRIAL—FINDINGS OF FACT—NECESSITY. In an action against lessees of land to foreclose a chattel mortgage upon crops, in which the owner of the land was made a party because of his claimed interest in the crops, on account of default of the lessees in failing to farm the land as provided in the lease, resulting in the production of a volunteer crop, a finding that title to the crop of grain was at all times in the owner of the land will be sustained, and it cannot be claimed that the finding is a mere conclusion and negated by other portions of the findings, in the absence of facts in the record affirmatively so showing, since findings are not necessary to support a decree in an equity case.

APPEAL—REVIEW—FINDINGS. Findings of the lower court will not be disturbed on appeal in the absence of the evidence.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered September 22, 1913, upon findings in favor of the defendants, after a trial to the court, in an action to foreclose a mortgage. Affirmed.

C. M. N. Love and *Hibschman & Dill*, for appellant.

Wm. O. Lewis, for respondent Bruce.

W. O. Miller, for respondents Coss & Jansen.

PARKER, J.—The Plough Hardware Company commenced this action in the superior court for Adams county against Raymond Stevenson and Henry Stevenson, copartners, to foreclose a mortgage given to it by them upon crops to be produced and harvested during the year 1912, on section 7, township 15, range 31, in Adams county, Thomas M. Bruce being made a defendant in the action because of his claimed interest in the crops which the chattel mortgage purported to cover. Thomas M. Bruce claims under a prior chattel mortgage given to him by the Stevensons as to crops grown

¹Reported in 142 Pac. 1144.

upon the east half of the section, and asks for foreclosure thereof by cross-complaint, and claims absolute ownership of the crops grown upon the west half of the section. A trial resulted in a decree foreclosing his mortgage upon the crops produced upon the east half of the section, and denying foreclosure of the hardware company's mortgage upon the crops produced upon the west half of the section. From this disposition of the cause, the Plough Hardware Company has appealed. The controversy here has to do only with the claims of the respective parties to the crops produced upon the west half of the section, which were adjudged to belong absolutely to Thomas M. Bruce, free from the lien of appellant's mortgage given to it by Stevenson and son.

The record before us contains no statement of facts showing the evidence upon which the learned trial court disposed of the cause. The facts found, and those admitted by the pleadings, so far as need be here noticed, may be summarized as follows: Thomas M. Bruce, respondent, has been at all times here involved the owner of the whole of section 7, and other lands, subject only to the rights of Stevenson and son under a three-year crop lease given by him to them in August, 1911, which lease contains, among other things, the following covenants and agreements:

"All the above described lands to be used for farming purposes and in a manner more particularly set forth as follows:

"All of east $\frac{1}{2}$ of section 7, and all of N west $\frac{1}{4}$ of section 16 to be seeded during September and October, 1911 and alternately farmed in like manner during the life of this contract; all of west $\frac{1}{2}$ of section 7 and north $\frac{1}{2}$ and the southeast $\frac{1}{4}$ of section 17 to be plowed and seeded within the year 1912, and alternately farmed in same manner during the life of this contract. . . .

"It is further agreed that party of first part [Bruce] is to receive and be entitled to the following proportion of the products raised on the said premises, to-wit, wheat, rye and hay, one-third, delivered to most accessible warehouse situated on railroad in Adams county, state of Washington. . .

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"It is further agreed that . . . if default shall have been made in any of the above covenants herein contained, it shall be lawful for the said party of the first part [Bruce] to re-enter the said premises and remove all persons therefrom."

The words "alternately farmed," it is conceded, means to seed and produce crops on the land in alternate years. In November, 1911, Stevenson and son, being indebted to appellant Plough Hardware Company, gave to it, to secure such indebtedness, a chattel mortgage upon "all the grain now being, standing and growing on, or that may be sown during the year 1911, and which during the season of 1912 may or shall be harvested or threshed from . . . section 7, township 15, range 31, E. W. M. . . ." The trial court found, touching this lease and appellant's rights thereunder, as follows:

"That it was provided in said agreement that said defendants Henry Stevenson and Raymond A. Stevenson should plow and seed to grain, in the year 1912, all of the west half of said section seven (7), township fifteen (15), range thirty-one (31), but that said defendants failed and neglected to plow or seed the said land in the season of 1912 and that all of the crop of grain grown thereon in the season of 1912 was a crop of volunteer wheat produced thereon without the expenditure, upon the part of said defendants Henry Stevenson and Raymond A. Stevenson, of any labor, seed, care, expense or labor whatsoever; that the title to the crop of grain grown thereon in the season of 1912 was at all times in the defendant Thomas M. Bruce."

These are all the material facts disclosed by the record before us which lend any aid to the solution of the problem presented.

Counsel for appellant contend that that part of the court's finding above quoted, to the effect "that the title to the crop of grain grown thereon in the season 1912 was, at all times, in the defendant Thomas M. Bruce," is, in substance, but a mere conclusion of law, and is negated by other portions

of the findings. We are unable to agree with this contention. Assuming, for the sake of argument, that this portion of the finding should be regarded only as a conclusion of law, nothing appears in the findings of the court, or elsewhere in the record, affirmatively disclosing facts inconsistent with this conclusion. We have seen that respondent, by the terms of the lease, had the right to enter upon the land and reclaim the same upon default in performance of the covenants to be performed by the Stevensons. While the findings, aside from this one claimed to be a mere conclusion of law, are not specific and certain as to whether respondent did take possession of the west half of the section and claim a forfeiture of Stevenson and son's right to that part of the leased land by reason of their failure to perform the covenant relative to plowing and seeding in the year 1912, looking to the production of a crop in the year 1913, there is nothing in the findings, or elsewhere in the record before us, affirmatively showing that respondent did not rightfully regain possession and control of the west half of the section. It is to be remembered that the judgment in favor of respondent, so far as his right to the crops produced in 1912 upon the west half of the section are concerned, is wholly negative. So it is not a question of whether the findings of the court affirmatively support that portion of the judgment. The real question is: Do the findings of the court, taken as a whole, affirmatively show a state of facts which negatives respondent's right to the crops produced upon the west half of the section, as against the rights of appellant, which is seeking to foreclose a mortgage against respondent not executed by him? It was wholly unnecessary, in support of this portion of the judgment favorable to respondent, that there be any findings at all; first, because this is an equity cause; and second, because respondent was on the defensive as to the crop upon the west half of the section, and the judgment denies the affirmative relief claimed by the plaintiff against him. *Schlossmacher v. Beacon Place Co.*, 52 Wash.

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588, 100 Pac. 1013; *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837; *Leitch v. Young*, 60 Wash. 446, 111 Pac. 449.

We conclude that, since there are no sufficient affirmative findings of fact to negative the conclusion of the trial court, that the title to the crop produced upon the west half of the section was at all times in respondent, and, the evidence not being brought here for our review, we are unable to say that the disposition of the cause in respondent's favor was erroneous. Presuming, as we must, that the judgment is correct, in the absence of facts in the record affirmatively showing to the contrary, it must be affirmed.

It is so ordered.

Crow, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

[No. 11958. Department Two. September 15, 1914.]

L. H. WHITE, *Respondent*, v. A. C. JANSEN, *as Sheriff etc., et al., Appellants*.¹

FALSE IMPRISONMENT—PROBABLE CAUSE—JUSTIFICATION. The existence of probable cause justifies an officer in making an arrest, even of the wrong person.

SAME—PROBABLE CAUSE—DEFINITION—INSTRUCTIONS. In an action for false imprisonment, the court sufficiently complied with defendant's requested definition that probable cause is "a reasonable ground of suspicion, supported by circumstances, sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty," where the court charged that "the sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information; if he did have such reasonable grounds for so believing, and did believe . . . he is not liable."

SAME—PROBABLE CAUSE—ELEMENTS—QUESTION FOR JURY. In an action for false imprisonment, an instruction reciting that "the sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in

¹Reported in 142 Pac. 1140.

the information," sufficiently sets forth the only element of probable cause necessary to be considered by the jury, namely, whether or not the sheriff used due diligence in identifying the plaintiff, it not being claimed upon the trial that the John Doe warrant was not sufficient, or that the description which the sheriff had of the accused did not apply to the plaintiff, it being shown that the sheriff made the arrest after a suggestion from the officer assisting him that plaintiff was not the man wanted, that he had been around the city for a period of 14 years and was well known, and that the sheriff ought to get some evidence of his identification before making the arrest.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. In an action against a sheriff for false imprisonment, a statement in the instructions that it was admitted in the case that the plaintiff did not commit the felony charged in the information upon which the warrant was issued, is not prejudicial as a comment on the facts, where there was no issue upon the trial whether the plaintiff was the person charged or not, the sole issue being whether the sheriff believed, or had reasonable grounds for believing, that plaintiff was the man, and it was clearly admitted upon the trial that plaintiff was not the man charged in the information, it not being error for the court to state an uncontroverted fact.

PLEADING—ANSWER—DENIAL ON INFORMATION. A denial on information and belief of an allegation that leave had been obtained by order of the superior court to sue upon the official bond of a sheriff is insufficient, as the order was a public document.

EVIDENCE—JUDICIAL NOTICE—PUBLIC RECORDS. The trial court will take judicial notice of an order granting leave to sue upon the official bond of a sheriff, it being a part of the court records.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered October 14, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for false imprisonment. Affirmed.

John Truax & W. O. Miller, for appellant Jansen.

Frederick W. Dewart, for appellant Title Guaranty & Surety Co.

McWilliams, Weller & McWilliams, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages against the sheriff of Adams county, and the surety upon his official bond, on account of alleged false arrest and

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imprisonment. The defendants have appealed from a judgment in favor of the plaintiff.

It appears that, in the year 1910, some horses were stolen in Adams county. An information was filed by the prosecuting attorney accusing "John Doe" of the theft. A warrant was issued upon this information, and placed in the hands of the sheriff to apprehend the accused. The sheriff thereafter discovered one of the stolen horses in the city of Spokane. He also found a man there who answered the description of the accused. At the time of the arrest in Spokane county, the sheriff was accompanied by a police officer who knew the plaintiff. This police officer informed the sheriff that he had known the plaintiff for a period of about 14 years; that he had resided in Spokane during that time; and that the sheriff had better get some other identification of the man than he then had before making the arrest. The sheriff, however, made the arrest and took the plaintiff to Ritzville, in Adams county, where the plaintiff was kept over night in jail. The next morning, after consultation between the sheriff, the plaintiff and the prosecuting attorney of that county, the plaintiff was released, and the sheriff paid his fare back to the city of Spokane. Thereafter the plaintiff brought this action.

At the trial, the court instructed the jury as follows:

"The arrest was made on what is known as a John Doe warrant, upon which kind of a warrant an officer is authorized to arrest the person guilty of the offense charged in the information upon which such warrant is issued. If, however, by virtue of such warrant he arrests a person who did not commit the felony, he will be liable to the person so arrested in damages, unless he had reasonable grounds for believing, and does believe, that the person whom he arrests is the person who committed the felony. It is admitted in this case that the plaintiff did not commit the felony charged in the information, upon which the warrant in question was issued. Therefore, the sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable grounds for believing, and did believe, that the plaintiff

had committed the felony charged in the information. If he did have such reasonable grounds for so believing that the plaintiff committed the felony charged in the information upon which the warrant was issued, and did so believe, he is not liable in this action. If, on the other hand, he did not have reasonable grounds for believing that the plaintiff was the man who committed the felony charged in the information upon which the warrant was issued, or if he did not believe the plaintiff was such man, then he is liable in damage to plaintiff.

“What would be reasonable grounds for believing that plaintiff was the man who committed the felony charged in the information in question is to be determined by you, and in determining that question you should determine whether or not the defendant exercised reasonable care and prudence in ascertaining whether the plaintiff had committed the crime charged or not, and whether he used such methods of investigating the same as a reasonably prudent officer would use under the same circumstances in ascertaining that fact, and whether under the facts so ascertained a reasonably prudent officer would make the arrest; and if you find from the evidence that a reasonably prudent officer, having the knowledge at hand and the means of knowledge at hand that the defendant had, would not before making such arrest have made any further investigation to ascertain whether or not the plaintiff committed the crime charged and would have arrested the plaintiff under the same circumstances as did the defendant, then your verdict should be for the defendant. On the other hand, if you find that a reasonably prudent officer would not have arrested the plaintiff under the circumstances as disclosed by the evidence, without making further investigation as to whether or not the plaintiff was the individual who committed the crime charged, then your verdict should be for the plaintiff.”

It is argued by the appellants that these instructions are erroneous in several particulars which will be noticed. The appellants contend that the decided weight of authority is to the effect that the existence of probable cause is a justification when the wrong person has been arrested by a sheriff. And then argue that it was the duty of the court to give a requested instruction which defines probable cause. We

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think there can be no doubt about the rule as stated, that where the arresting officer has probable cause, he is justified in making the arrest, even of the wrong person. It is clear to us that the instruction given correctly defines probable cause. The definition as contended for by the appellant is stated in *Rich v. McInerney*, 103 Ala. 345, 15 South. 663, 49 Am. St. 32, as follows:

“A reasonable ground of suspicion, supported by circumstances, sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty.”

We think this definition was met by the court when he stated to the jury:

“Therefore the sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information. If he did have such reasonable grounds for so believing that the plaintiff committed the felony charged in the information upon which the warrant was issued and did so believe, he is not liable in this action.”

This statement is of itself a definition of probable cause as above defined, because it directly told the jury that if the sheriff had reasonable grounds for believing, and did believe, that the respondent committed the crime charged in the information, he was not liable for making the arrest.

The appellants next argue that it was the duty of the court to name to the jury the elements necessary to constitute probable cause. It was not claimed upon the trial that the John Doe warrant was not sufficient, or that the description which the sheriff had of the accused did not apply to the respondent; but the contention was that the sheriff did not use diligence in identifying the respondent. The court very properly told the jury that this was the only question for them to determine, when he said:

“The sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable

grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information."

This was the principal question in the case upon the evidence. We have no doubt that if the sheriff had obtained a warrant for the arrest of the accused with the description of the person to be arrested, and had served it upon a man who was pointed out to him as being the man named in the warrant, the officer would be justified in making the arrest. And in such case, if the facts were undisputed, it would be a question of law for the court, and not for the jury. But in this case the respondent was not pointed out to the sheriff as being the person described in the warrant. On the other hand, it was suggested to the sheriff that the respondent was not the man wanted; that he had been around Spokane for a period of 14 years, and was well known. The sheriff was told by the officer assisting him to find the man that he ought to get some evidence of his identification before making the arrest. Nevertheless, he made the arrest. We think it was, therefore, a question for the jury whether the sheriff had reasonable grounds for supposing or believing that the respondent was the person charged with the crime. This was the only element of probable cause necessary to be considered by the jury.

The appellants also argue that the court erred in stating:

"It is admitted in this case that the plaintiff did not commit the felony charged in the information upon which the warrant in question was issued"

because the statement was a comment upon the facts, and for that reason the case should be reversed.

There was no issue upon the trial whether the respondent was the person charged or not. The issue was, did the sheriff believe, or did he have reasonable grounds for believing, that the respondent was the man. We think it was admitted upon the trial that the respondent did not commit the felony charged in the information, because it was agreed, at the

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time the respondent was discharged from custody at Ritzville, that he was not the man wanted. In answer to the question, "You became satisfied that this was not the man?" the sheriff replied: "I don't know at this time whether Mr. White is not the man, as far as my personal knowledge is concerned, no." Further testifying, referring to the time the respondent was discharged, the sheriff said:

"Q. And on that, you and he discharged him? A. We decided that he was not the man and we discharged him; yes, sir."

So it is apparent that it was conceded that the respondent was not the man charged in the information. This court has frequently held that it is not error for the court to state an uncontroverted fact. *State v. Gohl*, 46 Wash. 408, 90 Pac. 259; *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620; *State v. McDowell*, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912 C 782, 32 L. R. A. (N. S.) 414. We think the instructions were free from error.

The surety company argues that the court erred in denying its motion for judgment notwithstanding the verdict, upon the ground that there was no proof of the allegation that leave had been obtained from the court to sue upon the official bond of the sheriff. The allegation to that effect was denied upon information and belief in the answer. This denial was insufficient, because this order is alleged to have been made by the superior court trying the case. It was a public document, and a denial upon information and belief in such a case is insufficient. *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752.

The order has been brought here by supplemental record. The trial court was authorized to take judicial notice of it because it was a part of the court records.

We find no error, and the judgment is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11935. Department One. September 15, 1914.]

GEORGE W. BRIGHT, *Respondent*, v. J. W. OFFIELD *et al.*,
Appellants, J. P. JAMES *et al.*, *Defendants*.¹

BILLS AND NOTES—NEGOTIABILITY—RECITALS AS TO MORTGAGE. A recital in a note that it is of even date with a mortgage securing the note, but without expressly adopting the conditions of the mortgage, renders the mortgage ancillary thereto, the conditions of which alone do not change the character of the note as a negotiable instrument, under Rem. & Bal. Code, § 3394, providing that an unqualified order or promise to pay is unconditional though coupled with "a statement of the transaction which gives rise to the instrument."

SAME—PAYMENT—MATURITY OF NOTE—ACCELERATION—DEFAULT OF MAKER. Conditions in a note that if default be made in the payment of any of certain interest notes, as the same mature, for the space of thirty days, the whole amount of the note will at once be due and payable, together with provisions for payment with exchange on New York and for a reasonable attorney's fee in case of suit, do not render the note nonnegotiable, Rem. & Bal. Code, § 3393, providing that the sum payable is a sum certain, although to be paid by stated installments, with a provision that upon default in payment of interest the whole shall become due; or with exchange, whether at a fixed rate, or the current rate, or with attorney's fees in case payment shall not be made at maturity.

SAME—MATURITY—ACCELERATION—CONTINGENT PAYMENT. A provision in a note accelerating maturity by nonpayment of taxes and assessments on property mortgaged to secure the note does not render the note nonnegotiable, when considered only with reference to the time of payment, and without regard to the amount thereof, Rem. & Bal. Code, § 3395, subd. 2, providing that an instrument is payable at a determinable future time, within the meaning of the act, which is expressed to be payable on or before a fixed or determinable future time specified therein, applying to a note in which the only time of payment is "on or at a fixed period after the occurrence of a specified event which is certain to happen," and not to a note payable at all events at a time certain, but accelerated in maturity on the happening of a contingency.

SAME—PAYMENT OF NOTE—AMOUNT DUE—CERTAINTY. The negotiable character of a note is destroyed by a provision therein reciting that if the maker shall allow the taxes or any other public rates and assessments on the mortgaged property to become delin-

¹Reported in 143 Pac. 159.

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quent, or in case any taxes or assessments shall be levied against the holder on account of the note, then the whole amount secured shall become due and payable, and the mortgagee may at once proceed to collect the note and foreclose the mortgage given to secure the same, and sell the property, or so much as shall be necessary to satisfy the debt, interest and costs, and all taxes, public rates or assessments that may be due thereon; since there is an implication that the maker of the note is charged with the payment of the taxes, etc., the amount of which is uncertain, thereby rendering the amount of recovery under the note uncertain.

SAME—MATURITY—ACCELERATION—IMPAIRING SECURITY. A provision in a note secured by a mortgage that if the maker shall do any act whereby the value of said mortgaged property shall be impaired, the whole amount shall become due and payable, and the mortgagee may proceed to collect the debt and foreclose the mortgage, destroys the negotiability of the note, since it is, in effect, an undertaking to prevent the doing of certain things in addition to the payment of money, and the provision being similar to a condition authorizing the holder to declare the note due at any time he may deem the debt insecure, thereby destroying the negotiable character of the note.

SAME—NONNEGOTIABLE NOTE—INDORSEMENT. The indorsement of a nonnegotiable note operates only as an assignment, and does not make the assignor liable thereon either as maker, guarantor, or indorser.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 3, 1914, upon findings in favor of the plaintiff, in an action on a promissory note, after a trial to the court. Reversed.

Charles E. Congleton, for appellants.

Hamlin & Meier, for respondent.

ELLIS, J.—The plaintiff brought this action to recover judgment against the defendants as maker and indorsers of an instrument which reads as follows:

“On the first day of December, 1913, for value received, I promise to pay to Guaranty Loan & Investment Company, of Spokane, Washington, or order, the principal sum of fifteen hundred dollars (\$1,500), with interest thereon, at the rate of eight per cent per year, from the date hereof until ma-

turity, payable semi-annually according to the tenor of six interest notes, each for sixty dollars (60), bearing even date herewith; both principal and interest notes payable at the office of Guaranty Loan & Investment Co., Spokane, Wash. (with exchange on New York). And if default be made in the payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days, or if the maker of this note and interest notes attached hereto shall allow the taxes or any other public rates and assessments on the mortgaged property, or any part thereof, securing the aforesaid notes, to become delinquent, or shall do any act whereby the value of said mortgaged property shall be impaired, or in case any taxes or assessments shall be levied against the holder of this note, on account of this note, then upon the happening of any of said contingencies, the whole amount herein secured shall at once become due and payable, and the mortgagee, its legal representatives or assigns, may proceed at once to collect these notes and foreclose the mortgage given to secure the same, and sell the mortgaged property, or so much thereof as shall be necessary to satisfy said debt, interest and costs, and all taxes, public rates, or assessments that may be due thereon, together with a reasonable attorneys fee, if suit be commenced for the purpose of collecting this debt or foreclosing the mortgage securing the same. It is expressly agreed and declared that these notes are made and executed under and are in all respects to be construed by the laws of the state of Washington, and are secured by mortgage of even date herewith, duly recorded in Spokane county, of the state of Washington. This note bears interest at the rate of twelve per cent per annum, payable yearly, after maturity.

"Dated at Spokane, State of Washington, this first day of December, 1910. J. P. James."

This instrument was, by the payee, indorsed and delivered to defendant Harry E. Watson, and by the defendant Harry E. Watson to defendant J. W. Offield, and by the defendant Offield to one Samuel J. Nunn. The plaintiff is merely a holder for Nunn for collection. The defendants Offield interposed a general demurrer to the complaint, which was overruled. The issues having been formed, the case was

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tried to the court without a jury. Judgment was rendered against the defendants James P. James and J. W. Offield, and each of them, and against the community composed of J. W. Offield and wife. The defendants Offield and wife have appealed.

The appellants contend that the instrument in question is not negotiable because of the provisions of the negotiable instruments act. It is clear that if the note runs counter to that act, it is because of some of the following provisions found in §§ 1, 2, 3, 4, and 5 of the act (Laws 1899, p. 340). We quote by section numbers from Rem. & Bal. Code:

"Sec. 3392. An instrument to be negotiable must conform to the following requirements: . . .

"2. Must contain an unconditional promise or order to pay a sum certain in money;

"3. Must be payable on demand, or at a fixed or determinable future time.

"Sec. 3393. The sum payable is a sum certain within the meaning of this act, although it is to be paid—

"1. With interest; or

"2. By stated installments; or

"3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or

"4. With exchange, whether at a fixed rate or at the current rate; or

"5. With costs of collection or an attorney's fees, in case payment shall not be made at maturity.

"Sec. 3394. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with— . . .

"2. A statement of the transaction which gives rise to the instrument.

"Sec. 3395. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

"1. At a fixed period after date or sight; or

"2. On or before a fixed or determinable future time specified therein; or

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

"Sec. 3396. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

"1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

"2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

"3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

"4. Gives the holder an election to require something to be done in lieu of payment of money.

"But nothing in this section shall validate any provision or stipulation otherwise illegal." (P. C. 357 §§ 1, 3, 5, 7, 9.)

The appellants claim that the conditions in the note providing for an acceleration of maturity on certain contingencies render the note nonnegotiable. One decision is cited which holds that a mere recital in the note that it is of even date with a mortgage which is collateral to the note imports into the note all of the conditions contained in the mortgage and renders the note nonnegotiable. *Brooke v. Struthers*, 110 Mich. 562, 63 N. W. 272, 35 L. R. A. 536. According to what we believe to be the better rule, a mortgage securing a note, though referred to in the note but without expressly adopting its conditions, is merely ancillary to the note, and the conditions found in the mortgage alone will not change the character of the note as a negotiable instrument. The promise to pay is held to be a distinct agreement from the mortgage, and if couched in proper terms, the note is negotiable. *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. 1003, 68 L. R. A. 146; *Frost v. Fisher*, 13

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Colo. 322, 58 Pac. 872. This would seem to follow from the provision found in the third section of the negotiable instruments act (Rem. & Bal. Code, § 3394), above quoted. The reference to the mortgage would be a mere "statement of the transaction which gave rise to the instrument."

Here, however, the conditions which it is claimed render the note nonnegotiable are found in the note itself. Segregating the conditions contained in the note so as to consider their effect separately, the first we shall notice is this: ". . . if default be made in the payment of any of said notes so secured, or any part of them, as the same mature, for the space of thirty days . . . then . . . the whole amount herein secured shall at once become due and payable." This and the provisions for payment "with exchange on New York" and for a reasonable attorney's fee in case of suit, are clearly covered by the second section of the act (Rem. & Bal. Code, § 3393), above quoted. They do not render the note nonnegotiable. Slover, Negotiable Instruments (2d ed.), § 40, pp. 54 *et seq.*

Another condition is as follows:

"If the maker . . . shall allow the taxes or any other public rates and assessments on the mortgaged property . . . to become delinquent . . . or in case any taxes or assessments shall be levied against the holder . . . on account of this note, . . . then . . . the whole amount herein secured shall at once become due and payable, and the mortgagee, its legal representatives or assigns, may proceed at once to collect these notes and foreclose the mortgage," etc.

It is urged that the provisions run counter to §§ 1 and 4 of the act (Rem. & Bal. Code, §§ 3392, 3395, *supra*) in that they render the note not "payable on demand or at a fixed or determinable future time," as provided in § 1, and not payable "on or at a fixed period after the occurrence of a specified event, which is certain to happen," as the phrase "determinable future time" is defined in § 4. It will be noted that the negotiable instruments act contains no express provision

covering or declaring the effect of a stipulation in the note itself, accelerating the time of payment of the whole debt upon default of the maker in the payment of taxes upon the mortgaged property or upon the note itself. The last section of the act, Rem. & Bal. Code, § 3586 (P. C. 357 § 393), declares that in cases not covered by the act "the rules of the law-merchant shall govern." In *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. 888, which was decided without reference to the negotiable instruments act, but solely with reference to the old statute, Ballinger's Code, § 3650, which was there said to be but declaratory of the preexisting law, apparently meaning the law-merchant, it was held, following and quoting the supreme court of Pennsylvania, in *Ernst v. Steckman*, 74 Pa. St. 13, 15 Am. Rep. 542, that:

"The principle to be deduced from the authorities is this: To constitute a negotiable promissory note, the time, or the event, for its ultimate payment, must be fixed and certain; yet it may be made subject to contingencies, upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day."

We are of the opinion that the second subdivision of § 4 of the negotiable instruments act applies to notes in which the only time of payment is "on or at a fixed period after the occurrence of a specified event which is certain to happen," etc., and not to a note payable at all events at a time certain but accelerated in maturity on the happening of a contingency. Considered only with reference to the time of payment, and without regard to the amount of payment, the provision of this note accelerating maturity on account of nonpayment of taxes, etc., would not render the note nonnegotiable under the rule announced in the *Joergenson* case.

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There is another phase of this condition of the note, however, which makes the undertaking uncertain in the amount to be paid in case of acceleration of maturity by such delinquency of taxes, a condition not presented in the *Joergenson* case. Though there is no direct undertaking in the note for the payment of any of these taxes by the maker of the note, there is a necessary implication to that effect. There is a clear and direct provision penalizing him if he does not pay them, and permitting the mortgagee, its legal representatives or assigns, to at once collect the notes and foreclose the mortgage, thus clearly connecting the two instruments on the happening of this contingency, in which case the amount of recovery shall include not only the debt and interest, but also all taxes, public rates or assessments that may be due thereon. Since the amount of these taxes, rates and assessments is uncertain, the amount of recovery would be uncertain. This provision, therefore, renders the note not merely an unconditional promise to pay a sum certain, but also, in necessary effect, a conditional promise to pay an uncertain sum. The note, by its terms, is, in addition to a promise to pay a certain sum of money, a thinly veiled promise to pay the taxes on the mortgaged property, and not to allow taxes to be levied against the holder on account of the note. It is equivalent to a promise to pay these charges when due. So viewed, the instrument falls directly within the rule announced by the United States circuit court in *Farquhar v. Fidelity Insurance Co.*, 8 Fed. Cas., p. 1068, No. 4676, where it is said:

“Overlooking the clause touching attorney’s commission, how can it be said, that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property and in the hands of the holders (and this is the import of the stipulation); in some places they would probably be free from this charge, while in others they may be subjected to indefi-

nite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependent upon the domicile of the holder. And of these contemplated charges, or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character of negotiable paper."

See, also, *Howell v. Todd*, 12 Fed. Cases, p. 707, No. 6783; *Walker v. Thompson*, 108 Mich. 686, 66 N. W. 584; *Carmody v. Crane*, 110 Mich. 508, 68 N. W. 268; *Wistrand v. Parker*, 7 Kan. App. 562, 52 Pac. 59.

The instrument further provides that, "if the maker . . . shall do any act whereby the value of said mortgaged property shall be impaired," the whole amount shall at once become due and payable, and the mortgagee may proceed to collect the notes and foreclose the mortgage. This would authorize the holder of the note to proceed to collect the note and foreclose the mortgage upon the doing of any one of an almost infinite variety of things, such as suffering or committing waste, suffering the buildings to burn without replacing them, suffering a nuisance to be maintained upon the mortgaged or adjacent property, permitting undesirable tenants to occupy the premises, and many other things which might be suggested. It is, in effect, an undertaking to prevent these things, in addition to the payment of money. This provision is closely allied to a provision authorizing the holder of a note to declare it due at any time he may deem the debt insecure. Such a provision usually, and we think soundly, is held to destroy the negotiability of the note. *First National Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604;

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Smith v. Marland, 59 Iowa 645, 13 N. W. 852; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390.

See, also, *Killam v. Schoeps*, 26 Kan. 310, 40 Am. Rep. 313.

This instrument is a contract in which the maker has undertaken to do many things beside the payment of a sum certain in money. It is not a negotiable promissory note. Rem. & Bal. Code, § 3396, *supra*. The instrument being nonnegotiable, the writing of the appellant's name on the back of it operated only as an assignment of it. The appellant did not thereby make himself liable either as maker, guarantor, or indorser. *Thomson v. Koch*, 62 Wash. 438, 113 Pac. 1110; *Roy & Roy v. Northern Pac. R. Co.*, 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302. This conclusion renders it unnecessary to notice the other questions discussed in the briefs.

The judgment against the defendants J. W. Offield and the community consisting of J. W. Offield and Nettie C. Offield is reversed.

CROW, C. J., MAIN, and MOUNT, JJ., concur.

[No. 11346. Department One. September 15, 1914.]

ELIZABETH O'DONNELL, *Respondent*, v. HUGH MCCOOL
et al., *Appellants*.¹

APPEAL—RECORD—STATEMENT OF FACTS—LOST EXHIBITS—CERTIFICATE OF JUDGE. An appeal will not be dismissed for the reason that the exhibits introduced in evidence at the trial are not incorporated in, or attached to, the statement of facts, or on file in the supreme court, where it appears by affidavit that the exhibits have been lost or mislaid and cannot be found, and that no blame attaches to either of the parties to the action or their attorneys, but the trial court will be ordered to supply the exhibits if possible and order a hearing upon notice to determine whether the copies offered are in fact copies of the original exhibits or contain their material substance, and to certify the result of such hearing to the supreme court.

Motion to dismiss an appeal from the superior court for Stevens county, Sullivan, J., entered February 5, 1913. Denied.

Pedigo & Smith, for appellants.

Peacock & Ludden and *Samuel Douglas*, for respondent.

ELLIS, J.—Respondent has moved to dismiss this appeal for the reason that the exhibits introduced in evidence at the trial are not incorporated in, nor attached to, the statement of facts, nor on file in this court.

It appears from the certificate of the trial judge that these exhibits were ordered to be attached to the statement of facts and are certified to constitute a part of it. It also appears by affidavit of one of the attorneys for the appellants, that the original exhibits have been lost or mislaid in the clerk's office of the superior court of Stevens county, that diligent search for them has been made, but that they cannot be found. This affidavit, which is not controverted, fully exonerates the appellants and their attorneys from blame for the loss of these exhibits, and it is

¹Reported in 142 Pac. 1135.

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not claimed that there is any blame in that regard attaching to the respondent or to her attorneys. Upon the discovery, shortly before the time set for hearing in this court, that the exhibits were not attached and could not be found, the appellants applied to Honorable E. H. Sullivan, judge of the superior court for Spokane, who sat in the trial as visiting judge for Stevens county, to certify and order attached to the statement of facts as copies of the original exhibits copies supplied by the appellants, or to set a time for a hearing upon that application. Thereupon, the court entered an order as follows:

"Now on this 27th day of June, 1914, this matter coming on to be heard in open court before the Hon. E. H. Sullivan, the judge before whom the above cause was tried while sitting at Colville, as Judge *pro tem.* of the superior court of the state of Washington in and for Stevens county, Washington, and Everett J. Smith appearing for appellants, and Peacock & Ludden, Esqs. of counsel, appearing for respondents, appellants respectfully moved the court to certify the attached files as copies of original exhibits heretofore admitted in evidence in the above cause upon the trial thereof, or to set a time for further hearing, and appellants having submitted the affidavits and stipulations hereto attached in support of said motion, thereupon counsel for respondent refusing either to agree that this court might certify said copies of said exhibits, or to permit further hearing of the same, the court not being sufficiently advised declines to take any action in the premises."

This being an action in equity, triable here *de novo*, it is manifest that we cannot entertain the appeal without all of the evidence, including the exhibits. It is equally manifest that a grave injustice would result from a dismissal of the appeal where no fault attaches to the appellants or their attorneys.

While there is no statute expressly meeting such a case, we think that the trial court has the inherent power, under the circumstances of this case, to supply the exhibits if it can be done, and to order a hearing upon notice to all parties

concerned, to the end that it may be determined whether or not the copies offered are in fact copies of the original exhibits or contain their material substance.

It is, therefore, ordered that the clerk of this court transmit to the trial judge, Honorable E. H. Sullivan, the papers on file in this cause purporting to be copies of the original exhibits, together with the affidavits in support thereof, and that the trial judge, upon receipt of such papers and upon due notice to the attorneys for all parties to this action, proceed to a full hearing, taking whatever evidence he may deem necessary, and determining whether or not these copies are true copies of, or contain the full material substance of all the exhibits admitted in evidence, make a finding upon such hearing, and certify the result to this court.

The motion to dismiss the appeal is denied.

Crow, C. J., Gose, Main, and Chadwick, JJ., concur.

[No. 11562. Department One. September 15, 1914.]

ZORA E. LOEPER, *Appellant*, v. WILLIAM F. LOEPER *et al.*,
Respondents.¹

HUSBAND AND WIFE—SEPARATE MAINTENANCE—GROUNDS. To maintain an action for separate maintenance, it is necessary for plaintiff to show an abandonment without cause, or facts which in law constitute an abandonment, and that, having the ability so to do, the husband neglected or refused to support her.

DIVORCE—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. A judgment in an action for separate maintenance is *res judicata* in a subsequent action for divorce on the grounds of nonsupport, cruelty, and abandonment, as to all matters occurring before its rendition, where the judgment dismissing the former action showed that defendant had the ability to support his wife, certain real estate being decreed to be his separate property, and necessarily determined that he had not abandoned the plaintiff, and that she was at fault in living apart from him; since all matters alleged in the divorce action were, or might have been, alleged and litigated in the former action.

¹Reported in 142 Pac. 1138.

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JUDGMENT—EVIDENCE—RES JUDICATA. It is competent to prove, in an action for divorce, that the court, upon a former trial of an action by the same plaintiff for separate maintenance, announced before the rendition of judgment, that the evidence clearly showed that plaintiff left her home without cause, the question of abandonment being in issue in the divorce case and the defendant pleading the former judgment as *res judicata*.

DIVORCE—JUDGMENT—MATTERS CONCLUDED. Where the cause of action in a suit for separate maintenance is the same as that in a subsequent action for divorce, the conclusive effect of a judgment on the merits in the former action is not affected by the joinder of the husband's daughter as a party defendant, on the alleged ground that he had conveyed his property to the daughter in order to defraud the plaintiff.

Appeal from a judgment of the superior court for Spokane county, Miller, J., entered March 6, 1913, dismissing an action for divorce, after a trial to the court. Affirmed.

John M. Gleeson, for appellant.

Danson, Williams & Danson (*Geo. D. Lantz*, of counsel), for respondents.

GOSE, J.—On the 27th day of March, 1908, the plaintiff commenced a suit against her husband, the defendant W. F. Loeper, for separate maintenance. She alleged that "without fault on her part" she was compelled to leave the home of the defendant on the 15th day of November, 1906, and that she thereafter maintained herself. She alleged further that she left her home and lived separate and apart from her husband (a) because of his cruelty and the cruelty of his children by a former wife, who lived in the family domicile; (b) because he continued to harass and slander her thereafter, telling her employer that she was a woman of bad character and that she frequented immoral places. The defendant traversed the charges of cruelty, and alleged that the plaintiff, on the date alleged in her complaint, "abandoned and deserted the defendant without cause." After the cause had been tried, a judgment was entered on the 9th day of April, 1908, which, among other things, recites:

"That plaintiff Zora Loeper is entitled to none of the relief as demanded in her amended complaint herein, and that said action is hereby dismissed."

On the 5th day of July, 1912, she commenced this action for a divorce from her husband, on three grounds, (1) failure to support; (2) cruelty both before and after the separation in November, 1906, and (3) abandonment. She made Emma Loeper, a daughter of the defendant, a party, alleging that the husband had conveyed his property to her for the purpose of defrauding the plaintiff. The defendant husband traversed the charges of wrongdoing on his part, and pleaded the former judgment as a bar to the action. He also alleged that all the matters and things alleged in the complaint were or could have been alleged, and were or could have been litigated, in the former action. It seems to be conceded that the plaintiff has lived apart from her husband since the 15th day of November, 1906. The court held that the judgment in the former suit was *res judicata* as to all matters occurring before its rendition, and directed counsel to submit their testimony as to matters occurring subsequently to the rendition of the judgment. This they declined to do, and the action was dismissed. The appeal followed.

The appeal presents a single question, viz., is the judgment in the suit for separate maintenance *res judicata* as to all matters alleged in the complaint occurring prior to its rendition. In *Schonborn v. Schonborn*, 27 Wash. 421, 67 Pac. 987, an action for separate maintenance, the court said:

"To maintain the action it is sufficient for the complaint and the facts to show an abandonment without cause, and a neglect or refusal on the part of the husband, having ability, to support his wife, or such neglect as amounts to refusal. *Kimble v. Kimble*, 17 Wash. 75 (49 Pac. 216)."

This excerpt is quoted with approval in *Herrett v. Herrett*, 60 Wash. 607, 111 Pac. 867. The principle was first announced in *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216, where it was held that a wife who had been abandoned by her

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husband without cause could maintain an action in equity for separate maintenance independently of an action for divorce. Under these authorities it was necessary for the appellant in the first suit to show, (a) that her husband had abandoned her without cause, or that she was compelled to live apart from him because of conduct upon his part which in law constituted an abandonment; and (b) that having the ability to support her, he neglected or refused so to do. The judgment roll in the first suit shows that he had the ability to support her, as certain real estate was decreed to be his separate property. It is not claimed that he has supported her since she left her home. The judgment necessarily determined that the respondent husband had not abandoned the appellant, and that she was at fault in living apart from him. Indeed, it was proven at the trial of this case that the court, after the first trial, announced from the bench before the rendition of the judgment, that the clear preponderance of the evidence showed that the appellant left her home without cause. This evidence was objected to and is assigned as error, but we think it was competent.

The whole theory of the doctrine of *res judicata* is that a question once decided by a court of competent jurisdiction having jurisdiction of the parties is finally decided, until reversed upon appeal or otherwise set aside in some lawful way. *Averbuch v. Averbuch*, 80 Wash. 257, 141 Pac. 701; *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661; *Stay v. Stay*, 53 Wash. 534, 102 Pac. 420; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *Harding v. Harding*, 198 U. S. 317; *Kalisch v. Kalisch*, 9 Wis. 482; *Hoag v. Hoag*, 210 Mass. 94, 96 N. E. 49, 36 L. R. A. (N. S.) 329.

In *Perlus v. Silver*, we said:

"It is the settled law in this state that in an action between the same parties a judgment therein is *res judicata* as to all points in issue and also as to all points that might have been raised and adjudicated in such action;"

citing numerous authorities. In *Stay v. Stay*, the same principle was announced, the court saying:

"She alleges no fact that could not have been alleged in the former case, since every act of cruelty relied upon in this action had occurred prior to the time of that trial and was or might have been litigated."

Speaking to the same point in the *Averbuch* case, we said:

"It is elementary law that in divorce actions as in all others a judgment is final and conclusive upon all questions which were or might have been litigated;"

citing many authorities. It is not material that the form of the action be the same if the merits were tried in the first action. *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. 819.

Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325, cited by the appellant, does not announce a different rule. In the *Harding* case, the wife brought suit in the state of Illinois on February 3, 1890, for separate maintenance. The bill charged that the wife, without her fault, in consequence of her husband's cruel treatment, had been obliged to live apart from him. The decree recited that the wife, at the time of and since the commencement of the action, had lived separate and apart from her husband without her fault, and allowance was made for her separate maintenance. Subsequently the husband commenced an action against his wife for divorce, in the state of California. He alleged that the wife had wilfully deserted him in the month of February, 1890. The judgment rendered in Illinois was held *res judicata*. In the *Kalisch* case, the husband sued for a divorce on the ground that, on the first of September, 1856, his wife wilfully deserted him. She answered that, on the 22d day of September, 1856, she filed her petition for alimony in the court of common pleas of Hamilton county, Ohio, in which she charged that her husband had abandoned her and that she had separated from him in consequence of his ill treatment of her; that upon issue joined and a trial, the court

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found that the husband had abandoned her without cause and that a separation had taken place in consequence of his ill treatment, and decreed that he should pay her alimony. It was held that the judgment was a bar to the action. In the course of the opinion, the court said:

"It was contended by the counsel for the appellant that the judgment in the Ohio suit ought not to be a bar to this action, because the object of the former and present suit was different. . . . In both cases the ground or foundation of the action is the same, namely, desertion on the part of the defending party. In the proceeding for alimony the wife set up that her husband had abandoned her without cause; it was essential for her to sustain this allegation in order for her to obtain alimony."

The introduction of Emma Loeper as a party defendant, upon the allegation that she is holding property in fraud of the appellant's rights, does not change the rule. Where the cause of action in the two suits is the same, and the party sought to be estopped was a party to the former suit, and the case was decided on the merits, the introduction of a new party does not defeat the estoppel. 23 Cyc. 1112, 1113.

The appellant argues that the case at bar does not fall within the general doctrine of *res judicata*, because (1) an action for separate maintenance is one of equitable cognizance, and (b) the only relief that can be awarded in a suit for separate maintenance is a judgment for a sum certain to be paid at fixed periods of time. Conceding both premises, the conclusion does not follow. An action for separate maintenance is a civil action springing from equitable principles. An action for a divorce is a civil action based upon a statute. While there may be several grounds for either action, there can be but one cause of action, which cannot be split. For illustration, while the statute contains a number of grounds for divorce, a wife conceiving herself entitled to divorce on two or more grounds would not be permitted to pursue them separately, but would be deemed to have waived all grounds

not urged in the first action. *Umlauf v. Umlauf*, 117 Ill. 580, 6 N. E. 455, and *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479, 39 Am. St. 509, 23 L. R. A. 187, have been cited by the appellant to the point that the former judgment is not *res judicata*. While they in a measure sustain her contention, they are not in harmony with the views expressed in the *Schonborn*, *Herrett*, *Stay*, *Perlus*, and *Averbuch* cases.

The appellant has also cited a line of cases which hold that one who has mistaken his remedy in one action is not estopped to maintain a later action upon a correct theory. We so held in *Egbers v. Fischer*, 73 Wash. 308, 131 Pac. 1128, where we said:

"In truth what the respondent did in the former action was to pursue a remedy which he did not have, and this does not bar an action upon a proper remedy."

She has also cited cases which hold that an action prematurely brought does not bar the commencement of a new action when the cause of action has matured. The inappropriateness of such cases is too apparent to merit comment.

The judgment is affirmed.

Crow, C. J., CHADWICK, ELLIS, and MAIN, JJ., concur.

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Opinion Per MAIN, J.

[No. 11457. Department One. September 15, 1914.]

PHILIP A. KRUG, Respondent, v. DOBA E. KRUG, Appellant.¹

HUSBAND AND WIFE—SEPARATION—PROPERTY AGREEMENT—FRAUD.
An agreement between a husband and wife to dissolve the marriage relation and for a division of property rights, made in contemplation of separation and a subsequent divorce, which occurred, will not be set aside on the ground of fraud on the part of the wife in concealing from the husband her previous improper conduct with another man during the marriage relation, the evidence being insufficient to show positive immoral conduct on the part of the wife.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 18, 1913, upon findings in favor of the plaintiff, in an action for a divorce, after a trial to the court. Reversed.

Robertson & Miller, for appellant.

Scott & Campbell, for respondent.

MAIN, J.—The purpose of this action was to secure a decree dissolving the bonds of matrimony and annulling a post-nuptial property agreement and settlement between the parties. The cause was tried to the court without a jury. Judgment was entered granting a decree of divorce to the plaintiff and annulling the property agreement. The defendant has appealed.

The parties to the action were married in Whitman county, Washington, on the 9th day of July, 1907. Thereafter, with the exception of two or three years residence in Stevens county, they resided continuously in Spokane county. On the 2d day of May, 1912, a separation and property agreement was entered into, signed by the parties, and duly acknowledged. This agreement recited that the parties thereto had separated and dissolved the marriage relationship and community interests, and, among other things, provided that all the property which then stood in the name of the wife should

¹Reported in 142 Pac. 1136

be and become her sole and separate property, and that all the property which at that time stood in the name of the husband should likewise be his sole and separate property.

The findings of the trial court, so far as here germane, are as follows:

"(3) That this defendant has treated this plaintiff in a cruel and inhuman manner and has heaped upon him personal indignities rendering his life burdensome, in that during and since the month of June, 1911, and up to and including the month of September, 1912, she has openly, notoriously, continuously and improperly consorted and kept company with one Herbert F. Rising, without the consent of plaintiff and for a great portion of said time without his knowledge, and that such improper conduct consisted of frequent visits made by the said Rising to defendant at plaintiff and defendant's home, during plaintiff's absence therefrom, and of said defendant meeting said Rising at various times away from her home, for the purpose of improperly associating and consorting with him; that the said defendant deceived plaintiff in that she stated to him when going away that she was visiting a lady friend whom she designated as an 'old maid,' who did not wish or care for the society of men, and that the said plaintiff did not learn or know that plaintiff was deceiving him in this regard until on or about the first of June, 1912, and that such conduct resulted in plaintiff and defendant separating shortly after the first of May, 1912, and thereupon defendant removed from her home in the residence district in the city of Spokane, Washington, and took an apartment in a down-town apartment house, where she would not attract public notice in receiving the attentions of the said Rising, and that after removing to said location she did receive the attentions of the said Rising, and did thereafter openly, notoriously, continuously and improperly consort with him, and especially so upon the 15th day of June, 1912, at the hour of 9:30 P. M.

"(5) That at the time said contract was entered into and the property divided as aforesaid, this plaintiff was totally ignorant of defendant's improper association with the said Herbert F. Rising, as hereinbefore found, and did not know that the defendant was associating, keeping company and consorting with him, and further that the said plaintiff did

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not learn of such association of the said defendant and the said Rising until on or about the first day of June, 1912; that by reason of plaintiff's lack of knowledge concerning the said defendant's association with the said Rising as aforesaid, and of her not giving him full information of the same, the said defendant practiced fraud and deceit on this plaintiff in the procuring of said contract to such an extent that the same is not valid and binding upon the plaintiff herein, and should be set aside, annulled and held for naught."

In the decree the court made a property allowance to the wife, but this was in a less amount than that which she was to have under the contract.

The sole question here for determination is whether the trial court erred in vacating and setting aside the post-nuptial property agreement. The facts found, which are above set out, are sustained by the evidence. The inquiry, then, must be directed to the question whether the facts found justified the court in vacating and annulling the written contract signed by the parties.

Both parties seem to be content with the decree so far as it dissolves the bonds of matrimony. The question is, whether the failure of the wife to disclose to her husband, at the time the property agreement was executed, her previous association with Rising constituted fraud which inhered in the property settlement contract. Both the appellant and the respondent agree that if the contract is to be annulled it must be on the ground of fraud. It is a familiar rule that, in order to establish fraud, it is necessary that the evidence be clear and convincing. The conduct of the wife subsequent to the execution of the agreement cannot be considered as affecting the validity of the contract, except in so far as such conduct would serve to explain or interpret her previous acts. The only fraud claimed, or found by the trial court to exist, consisted in the failure of the wife, at the time of the execution of the contract, to make known to her husband that she had previously been associating with Rising.

The contract recites that the parties thereto "have separated and dissolved their marriage relationship and community interest." It is also provided that the "party of the first part [the appellant] hereby waives and releases any and all claims or demands for alimony, suit money and attorneys' fees which she may have against the party of the second part in any action of divorce which she may prosecute." The parties, by their contract, settled their property rights, recited that they had separated and dissolved their marriage relationship, and recognized that a divorce action might be instituted. The husband, at this time, it is true, did not know of the wife's previous association with Rising, but, aside from this dereliction, there must have been in his mind sufficient grounds to justify the contract which he executed. While the evidence shows that the husband was not fully apprised as to the shortcomings of the wife, it yet does not appear that the derelictions of the wife, which were unknown to him, are sufficient to justify the setting aside the contract on the ground of fraud. Had the contract been executed upon the assumption, or upon the reasonable grounds for belief, that the marriage relation would be continued after its execution as before, then an entirely different question would be presented. It may also be that one party to the marriage relation might so far disregard its obligations that a contract entered into without knowledge of such faithlessness would constitute fraud, even though there were sufficient known grounds which justified the separation and settlement; but if there be such a rule, the facts of this case do not come within it. Giving the evidence of the facts which occurred prior to the execution of the agreement their severest interpretation against the appellant, they would yet fall short of showing positive immoral conduct. That the appellant associated with a man not her husband, and that this was not known to the respondent at the time the contract was executed is plain; but the contract being executed with view to a separation, which occurred, and ultimately a divorce, it

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Statement of Case.

would seem that the conduct of the wife was not a fault sufficient to constitute fraud which inhered in the contract. The authorities cited in each of the briefs have been examined with care, and in none of them is the exact question here presented considered.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter judgment in accordance with the view herein expressed.

Crow, C. J., ELLIS, and GOSE, JJ., concur.

[No. 11535. Department One. September 16, 1914.]

SMITH & COMPANY, *Respondent*, v. O. DICKINSON *et al.*,
Appellants.¹

CORPORATIONS — ACTIONS — FOREIGN CORPORATIONS — CONDITIONS PRECEDENT—DOING BUSINESS IN STATE. A foreign corporation is not doing business in this state, within Rem. & Bal. Code, §§ 3714, 3715, requiring the payment of an annual license fee, and providing that no corporation shall maintain any suit or action in any court of the state without alleging and proving payment of its annual license fee last due, although the agent of the corporation maintained offices in this state where he kept samples for exhibition when soliciting orders for the corporation, a manufacturing concern, and it appeared that the agent had made resales of goods shipped to customers, and had, on one occasion, sold his samples when a certain line of stock had been exhausted, which sales were subject to the approval of, and were closed by, the home office, and that the name of the corporation appeared in both the telephone and city directories together with that of the agent as its representative; since the transactions of the agent were only incidental to the regular business of the corporation, which by taking orders through an agent in the state, subject to approval and shipment by the home office, was conceded to be interstate commerce, upon which the state could impose no burden.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 20, 1913, upon findings

¹Reported in 142 Pac. 1133.

in favor of the plaintiff, after a trial before the court, in an action on contract. Affirmed.

Gates & Emery, for appellants.

Kerr & McCord, for respondent.

CROW, C. J.—This action was commenced by M. E. Smith & Company, a corporation, against O. Dickinson and Ida Williams, copartners, on an account for merchandise sold and delivered. From a judgment in plaintiff's favor, the defendants have appealed.

Respondent, a foreign corporation, has filed no copy of its articles of incorporation with the secretary of the state of Washington, nor has it paid an annual license fee to the state of Washington. Rem. & Bal. Code, § 3714 (P. C. 405 § 347), requires the payment of an annual license fee by every corporation incorporated under the laws of this state, and by every foreign corporation having its articles of incorporation on file in the office of the secretary of state; and § 3715 (P. C. 405 § 349), provides that no corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. In *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505, it was held that the provision of § 3715, above mentioned, has reference only to corporations "doing business in this state." It follows that the controlling question before us is whether respondent, a foreign corporation, was "doing business" in this state.

The trial court found that respondent is a corporation organized and existing under and by virtue of the laws of Nebraska, having its principal place of business in the city of Omaha, state of Nebraska, and that it is not doing business within the state of Washington. The evidence shows that respondent is manufacturing merchandise in the state of Nebraska, and is selling merchandise at wholesale in that state and other states, including the state of Washington; that its

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representatives take orders for merchandise and forward the same to respondent at Omaha for acceptance or rejection; that if the order is accepted, the merchandise is shipped from Omaha, Nebraska, to the purchaser, to whom it is sold upon credit; that the contract of sale is consummated in Omaha; that respondent has salesmen who solicit orders in the state of Washington; that its principal salesman is one Edward J. Bussey, who has offices in the cities of Seattle and Spokane, where he keeps and exhibits samples belonging to respondent; that he solicits orders throughout this state, sometimes taking trips to do so; that sometimes, in the interest of economy, he pays the expenses of proposed customers from their places of residence to Spokane or Seattle, where he exhibits the samples and receives their orders; that all such orders, when taken, are forwarded to respondent at Omaha for its approval, and for shipment of goods; that respondent's agents are not entitled to complete sales, to extend credit, or make collections, but that they represent respondent only in soliciting orders. The above statement covers respondent's general method of making sales in this state. It appears from the evidence that, on two or three occasions, where sales had been thus made to customers to whom the goods upon receipt did not prove satisfactory, Mr. Bussey resold the goods to other customers with shipping orders; that these resales were subject to respondent's approval; that on one occasion, when certain lines of respondent's stock had been exhausted, Mr. Bussey sold to appellants the samples of that stock which he had in Seattle; that this sale was also closed through the Omaha office upon Mr. Bussey's report, as shown by exhibits in the record; that Mr. Bussey, as respondent's agent, had a telephone in his office, and that respondent's name appeared in Polk's directory for the city of Seattle in the following words: "Smith, M. E., & Co., (Omaha, Neb.) Edwd. J. Bussey, Coast Rep., wholesale dry goods, 40 Postal Telegraph Bldg."

Appellants concede that the taking of orders by respondent through an agent in this state, subject to approval and shipment by respondent in Omaha, is not doing business in this state in contemplation of the statute, but is interstate commerce, upon which the state cannot impose any burden. They contend, however, that as respondent's agent had offices in Seattle and Spokane, where he kept samples for exhibition when soliciting orders, as resales were made of goods which had been shipped to customers, as samples were sold to appellants, and as the names of respondent and its agent appeared in the telephone and city directories in the manner above stated, respondent was doing business in this state in contemplation of the statute, and cannot institute or maintain this action, having failed to file its articles of incorporation, or pay its license fee. The transactions last mentioned were only incidental to respondent's regular interstate business, and in so far as they constituted sales, were subject to respondent's approval. Respondent's business of making sales from samples, in the manner stated, was interstate commerce. Its merchandise was manufactured in Nebraska, and shipped directly to purchasers in this state upon approval and acceptance of their orders received through respondent's agents. Under such facts, it has been repeatedly held that a corporation is not doing business in the state where the goods are delivered. It is apparent that the legislature in enacting the law requiring payment of an annual license fee, did not intend to impose a burden upon interstate commerce. To hold that it did so intend would place an interpretation upon the act which would require us to hold it unconstitutional. The legislature only intended to require payment of the fee by foreign corporations actually transacting a local business in this state. In *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 58, the identical question here presented was before the court upon similar facts, and in holding that the foreign corporation was not doing business in the state of Idaho in contemplation of a similar statute,

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the court, citing numerous authorities which strongly sustain its conclusions, said:

"It is contended by counsel for appellant that although the respondent manufactured its machinery in the state of Wisconsin, and simply took orders, as above stated, for the sale of such machinery within the state of Idaho, it comes within the provisions of said act, and cannot maintain this action. We cannot agree with counsel in that contention. The legislature never intended that that law should apply to foreign corporations, except those actually engaged in business within the state, and excludes interstate commerce. And it was not intended to apply to interstate commerce between corporations or citizens of other states and citizens or corporations of this state. In *Iron Works v. Cohen* (Colo. App.) 43 Pac. 667, under a law similar to the one in question, it was held that a single sale of machinery within the state by a foreign corporation is not within a statute prohibiting such corporations 'doing business' in the state before complying with certain conditions, such as filing articles of incorporation. . . .

"If the legislature intended to apply the provisions of the law under consideration to facts such as those involved in the case at bar, it must be held unconstitutional, as in violation of the commerce clause of the federal constitution. But we do not think the legislature intended to have it applied to transactions such as those involved in the case at bar—in other words, interstate commerce. A state cannot require a foreign corporation engaged in interstate commerce to designate an agent or have a place of business within the state."

In *People v. Roberts*, 48 N. Y. Supp. 1028, under similar facts, the court held that a New Jersey corporation was not doing business in the state of New York in contemplation of laws of the latter state, which taxed corporations for doing business therein. See, also, *Tallapoosa Lumber Co. v. Holbert*, 39 N. Y. Supp. 432. The trial court correctly held that the respondent was not doing business in the state of Washington.

The judgment is affirmed.

CHADWICK, MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11993. Department One. September 16, 1914.]

CHARLES M. SCRIBNER *et al.*, Respondents, v. E. E. PALMER,
Appellant.¹

FRAUD—MISREPRESENTATIONS—KNOWLEDGE OF FALSITY—COMPLAINT—SUFFICIENCY. A complaint sufficiently alleges knowledge of the falsity of representations inducing an exchange of real properties, where it alleged that defendant represented that an option contract which plaintiffs were induced to take as part payment for their land had been investigated by him and was first-class, gilt-edged security, that there was no doubt but that the payments would be made as provided in the contract, as the party obligated thereby was abundantly able to make the payments and pay the interest thereon, that by reason of the alleged facts and on account of the intimate relations with defendant and their confidence and belief in his integrity, plaintiffs relied on the representations and consented to make the trade, and paid defendant a commission for his services, when in fact the representations were false and the option contract was worthless as security; since, although the better practice is to charge *scienter* directly, it is sufficient if the facts alleged import knowledge.

SAME—EVIDENCE—ADMISSIBILITY. In an action for fraud in inducing an exchange of properties, by reason of misrepresentations of a broker respecting the security of an option contract taken as part payment for the purchase price of plaintiffs' land, a letter and stock certificate sent to plaintiffs some time after their knowledge of the fraud, the letter stating that the stock was given to plaintiffs for the mistake which had been made, are admissible as showing the intimate relation existing between the parties.

FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to show fraud on the part of a broker, where it appears that, to induce plaintiffs to make an exchange of properties, he represented that an option contract on land located in a distant state, which was offered as a part consideration for the trade, was a gilt-edged security, that he had investigated the contract and the financial standing of the vendees and that there was no doubt but that the payments under the contract would be made, and that all plaintiffs would have to do would be to collect the principal and interest as it became due, that plaintiffs relied upon the representations of defendant, who was an intimate friend, but later ascer-

¹Reported in 142 Pac. 1166.

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tained that the contract would not be met, and that the land was worth considerably less than represented and was mortgaged for nearly its full value.

FRAUD—MISREPRESENTATIONS—DAMAGES—EVIDENCE. In an action for fraud, brought by vendees against a broker for misrepresenting the value of property conveyed by an option contract which he induced plaintiffs to accept as part payment on a trade of properties, evidence of the market value of the land traded by plaintiffs is admissible, since the plaintiffs are not entitled to the value of their bargain, as they would have been in an action against the vendor, and as against the broker the measure of damages is the actual damages sustained, or the difference in value between the property sold and the contract which plaintiffs took relying on defendant's representations.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 15, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for fraud. Reversed.

O. B. Setters and *O. C. Moore*, for appellant.

Merritt, Oswald & Merritt, for respondents.

CHADWICK, J.—The facts, as the jury must have found them to be, are as follows: Plaintiffs, an aged couple, had lived for more than thirty years at Newman Lake, near Spokane, Washington. They owned a tract of land consisting of about 121 acres, live stock, farm machinery, hay, grain and other personal property, all of the alleged value of \$11,380. They were desirous of disposing of their property and investing the proceeds, and accordingly consulted with defendant, a friend of many years standing and in whom they had great confidence. Defendant was about 45 years of age, had been active in the neighborhood in which plaintiffs lived, and had been a familiar with plaintiffs' older children. At this time he was engaged in the real estate business at Hill-yard, a suburb of Spokane. Defendant presented a party by the name of Hodge to plaintiffs as a prospective buyer. Hodge offered in trade a house and lot in Spokane in which it was agreed that there was an equity of \$3,000 over a mort-

gage of \$1,500, and an option contract for land he had sold to a man named Ball and upon which there was due in several deferred principal payments the sum of \$8,380, with interest at 6 per cent per annum. The land was located in the state of Oklahoma, and neither plaintiffs nor defendant had any knowledge of its value, and as it transpires, defendant had no knowledge of the financial responsibility of the vendees Ball and wife. Plaintiffs were not inclined to gamble on values and expressed some doubt as to the value of the contract. They were disinclined to take it over in part payment for their land, and would not have done so but for the fact that defendant wrote to them that he had investigated the contract and financial standing of the Balls and that the security was gilt edged. Later, in personal conversations, he made like assurances, saying that there was no doubt about Ball meeting his contract; that the option contract was better security than a mortgage; that all plaintiffs would have to do would be to collect the principal and interest as it became due. Defendant further quieted the doubts of the plaintiffs by telling them that he had been told that Ball was a splendid business man; that he, Ball, had come from Oklahoma and must have known the land or he would not have traded for it; and that he would not make a trade for them that he would not make for his own father and mother if they were living. The trade was therefore consummated, and plaintiffs paid to defendant a fee of \$250. The payments then next due were not paid, and no response coming from repeated letters, Mr. Scribner went to Oklahoma and there found out that the option contract would not be met; that the land did not exceed in value a greater sum than \$2,000, and that there was a mortgage lien against it of some \$1,500. This action was then brought against defendant to recover the sum of \$8,380 for the loss of the value of the real estate contract as agreed upon between the parties to the sale. A verdict as prayed for was returned by the jury. Judgment followed, and defendant has appealed.

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Error is alleged in, (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) in admitting a letter and a stock certificate in evidence; (3) in the instructions to the jury; (4) in denying defendant's motion to dismiss at the close of plaintiffs' case, and again when all of the evidence had been taken; (5) in rejecting evidence touching the value of plaintiffs' land, and as covering the whole case, in denying a motion for a new trial and entering judgment on the verdict.

(1) It is contended that the complaint is demurrable in that it does not allege a *scienter*. *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180. It is alleged in the complaint,

"Said defendant then falsely represented to them (plaintiffs) that said contract was a gilt edge security and stated that all they would have to do would be to collect their interest; that there was no doubt but that the payments would be made as provided in said contract, and that said Ball, the second party in said contract, was abundantly able to pay the payments provided in said contract and the interest thereon, and that it was a first class, gilt edge deal for them to take. By reason of the facts as hereinabove alleged, and on account of the intimate relations with defendant and of their faith and confidence in him, and believing in his integrity, plaintiffs relied upon defendant's said false representations, and, solely by reason thereof and relying thereon, they consented with defendant that they would make said trade, which said trade was consummated and said contract was assigned to said plaintiffs and said Spokane real estate was conveyed to said plaintiffs, subject to said \$1,500 mortgage, and plaintiffs in turn conveyed their said real estate to said Hodge and turned over and transferred said horses, wagons, implements, produce, etc., in consideration thereof, and paid to defendant the sum of two hundred fifty (250) dollars as and for his commission for making said trade for them."

We think this is a sufficient allegation within the authority relied on, as well as later decisions of this court. False representations to be actionable must be made with a knowledge that they are false, or under such circumstances that the law

will impute knowledge; but it does not follow that the legal conclusion of *scienter* must be alleged in words. While it is more finished pleading to charge *scienter* directly, it is enough if specific allegations which sufficiently import knowledge are used. 8 Ency. Plead. & Prac., p. 902. In this case, plaintiffs alleged confidence in, and reliance upon, the judgment of defendant; that he stated as true that which, in the light of subsequent events, proved to be positively untrue, under circumstances which invited him to a finding and declaration of the fact and not to the hazard of an opinion. Defendant asserted, as an inducement to the trade, that the security was gilt edged, whereas it is alleged that it was worthless. This in itself is sufficient to carry the case beyond a demurrer. There would be no protection in the law if an agent, after ten days or two weeks for investigation, could report as an inducing fact that of which he was in utter ignorance. For a consideration, promised or paid, defendant put himself in a position where it was his duty to know the truth, and his conduct is measured by the same rule as one who wilfully states that to be true which he knows to be false. When defendant assumed to know the fact and knew that his assurance was the basis of the trade, he cannot be heard to say that he is not liable because he did not know. The time for him to speak was then, not now. The trend of modern authority is to break away from the more technical rules of pleading and to hold the maker of false representations to a stricter account. *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447.

(2) Some time after it had become known that plaintiffs had been defrauded, defendant wrote to Mr. Scribner as follows:

"Friend Scribner: I am this day sending you 500 shares of stock. Now Chs. this stock is selling for \$1 per share. I want you to keep it and if things progress as they should this ought to bring you in \$200 per year at the least calculation. Will not be bringing in until about 1½ or 2 years

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but keep it don't sell it for I have put in about 16 months and I feel we are all right. I simply give you this for the mistake we made. Yours very truly, E. E. Palmer."

The letter and stock certificate were admitted over the strenuous objection of defendant. The court said, when admitting these exhibits, that they would be admitted only as tending to show an intimate relation between the parties. They were competent for this purpose.

(3) Exceptions were reserved to the instructions of the court defining fraud. As we have decided this case this assignment is not very material. Inasmuch as a new trial will have to be granted, defendant can request an instruction covering his theory of the law. Our first impression is, however, that the instruction complained of states a proper rule of law as applied to the facts in this case.

(4) The court did not err in overruling the motion for a nonsuit and in refusing to direct a verdict.

(5) We think the court erred in refusing to allow defendant to inquire into the market value of the land traded by plaintiffs to Hodge, and in instructing the jury that, in the event they found for the plaintiffs, to return a verdict for \$8,380, the agreed value of the Ball contract. The court was of opinion that "this is one of the considerations where the consideration expressed was accepted as the measure, and not the actual value of the property." This would no doubt be the rule if this were a case between plaintiffs and Hodge. They were as to him entitled to their bargain at the valuation put upon it by the parties when making the trade. *Wolff v. Love*, 78 Wash. 561, 139 Pac. 597. That rule sounds in contract and does not pertain where an action is brought against an agent for deceit or negligence. Defendant did not agree to pay plaintiffs money or money's worth for the land, and the recovery, if any, must of necessity be the actual damages sustained, or the difference in value between the property sold and the contract which plaintiffs took relying upon defendant's representations. While

the authorities are not harmonious, the better rule is that, where a party fixes a value upon his property, and by fraudulent misrepresentations induces another to purchase it, and it is lost to the other party, he should not be allowed to defend by pleading his own fraud or the credulity of his victim, but should be bound by the agreed value. The parties to this action were not dealing as vendor and vendee but as principal and agent, and plaintiffs cannot sue as upon a contract for the loss of their bargain, for under the facts defendant was not a guarantor. The remedy is in tort. Defendant is answerable for the actual damages suffered, and no more. Actual damages means a just compensation for the wrong suffered.

In *Robinson Machine Works v. Vorse*, 52 Iowa 207, 2 N. W. 1108, there was a duty upon the defendant to accept none but "undoubted paper." Vorse exercised no diligence to ascertain the solvency of the purchaser but accepted worthless paper. "He surely became liable for this negligence whereby plaintiff lost its debt." In *Frick & Company v. Larned*, 50 Kan. 776, 32 Pac. 383, it is said:

"The law requires fidelity and reasonable care and diligence on the part of agents in the transaction of business for their principals. In the absence of any specific provisions as to the care of agents in ascertaining the responsibility of persons to whom sales were made on credit, they would be held to a careful examination of the credit of a proposed purchaser and to the exercise of reasonable care in ascertaining from the usual sources of information as to his ability to meet payments when they were to be made. In this case care and diligence were especially enjoined upon the agents, and while they did not become guarantors of the responsibility of the persons to whom sales were made, they bound themselves to a high degree of care and diligence in ascertaining the financial standing and ability of the persons from whom orders were taken."

See, also, *Osborne & Co. v. Rider*, 62 Wis. 235, 22 N. W. 394; 31 Cyc. 1460.

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"It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequences of his acts. . . . The damages which the principal may recover in such cases are the actual damages sustained by reason of the agent's disobedience. The damages recovered are to be compensatory only." Clark & Skyles, *Law of Agency*, p. 875, § 384.

See, also, 31 Cyc. 1469.

Reversed and remanded for a new trial.

Crow, C. J., ELLIS, GOSE, and MAIN, JJ., concur.

[No. 11945. Department One. September 16, 1914.]

G. E. LOVELL, *Respondent*, v. THOMAS MUSSELMAN,
Appellant.¹

MORTGAGES—NOTES—CONFLICT—TIME FOR PAYMENT—CONSTRUCTION. A note for \$250, dated September 16, 1908, payable one year after date, is not modified in its terms by the execution of a mortgage on the same day reciting that it was made on consideration that plaintiff should defeat a decree of divorce, and to secure the payment of \$350, according to the terms of two notes made by the mortgagor, one of which is payable to plaintiff "for \$250, due November 1, 1909;" since it is an unconditional promise to pay a fixed sum of money upon a day certain, the mortgage not purporting to postpone the maturity of the note, or to make its maturity contingent upon the event stated in the mortgage; and since the note and mortgage, if not conflicting, will be construed together so that effect may be given to both.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 9, 1913, in favor of the plaintiff, in an action on a promissory note, after a trial to the court. Affirmed.

Berkey & Cowan, for appellant.

Zent, Powell & Redfield, for respondent.

¹Reported in 142 Pac. 1143.

GOSE, J.—This is a suit upon a promissory note. There was a judgment for the plaintiff. The defendant has appealed.

The facts are these: On the 16th day of September, 1908, the appellant made and delivered his promissory note to the respondent for \$250, payable one year after date, without grace, for value received. On the same day, the appellant executed to the respondent a mortgage, which recites that it is executed "for and in consideration of said attorney to defeat decree of divorce." It further recites that it is given to secure the payment of \$350, with interest, according to the terms and conditions of two promissory notes made by the mortgagor, one of which is payable to the respondent "for \$250, due November 1, 1909." The mortgage further recites that, in case default be made in the payment of either the principal or interest of said note or any part of either principal or interest, "according to the terms of said notes," the holder of the notes may foreclose the mortgage for the whole amount then due on account of principal, interest, etc. It will be observed that the note in controversy is made payable on the 16th day of November, 1909, whereas the mortgage recites that it secures a note for a like amount in favor of the respondent, due November 1, 1909.

The appellant contends that the note and the mortgage should be read and construed together, and that, when so construed, it will appear that the consideration for both the note and the mortgage is that the respondent should defeat a decree of divorce, which it is shown he did not do. The appellant's contention cannot be sustained. The note is an absolute and unconditioned promise to pay a fixed sum of money upon a day certain. The most that can be said is that the consideration for the mortgage was that the respondent should defeat a certain decree of divorce. The law is that, if a note and mortgage contain conflicting provisions, the note will govern as being the principal obligation. 27 Cyc. pp. 1135, 6, subd. b; *Bell v. Engvolsen*, 64 Wash. 33, 116

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Pac. 456. In that case, in considering the precise question, we said.

"When a note is made and a contemporaneous writing is executed to secure or qualify it, the two instruments, *when not conflicting*, will be construed together so that effect may be given to both. The purpose of the court is to gather the intent of the parties, not from the one writing, but from all of them." (The italics are ours.)

Dobbins v. Parker, 46 Iowa 357, and Daniel, Negotiable Instruments (5th ed.), 156, are to the same effect.

In addition to the cases to which we have referred, the appellant has cited *Jacobs v. Mitchell*, 46 Ohio St. 601, 22 N. E. 768. It does not sustain his position. The rule there announced is that, where a note is made and delivered for the payment of a sum certain upon a fixed date, and concurrently therewith a separate agreement is entered into between the maker and the payee to the effect that the note should not become due and payable until the happening of an agreed contingency, an action on the note cannot be maintained until the terms of the concurrent agreement have been complied with. The case would be in point if the mortgage made direct reference to the note and provided that, notwithstanding its terms, it should not be payable until the happening of the contingency named in the mortgage. If it may be said that there is a conflict between the note and mortgage, the terms of the note will control. The truth is, however, that the mortgage does not purport to postpone the maturity of the note, or to make its maturity contingent upon the happening of the event stated in the mortgage. The note was long past due when suit was brought, and the court was right in holding that its terms were in no way modified by the mortgage.

The judgment is affirmed.

Crow, C. J., CHADWICK, ELLIS, and MAIN, JJ., concur.

[No. 11982. Department Two. September 16, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Louisa A.
Conner et al., Plaintiff, v. THE SUPERIOR COURT FOR
SKAGIT COUNTY et al., Respondents.*¹

CONSTITUTIONAL LAW—VESTED RIGHTS—DIKING DISTRICTS—ASSESSMENT OF BENEFITS—JUDGMENT—CONCLUSIVENESS. 3 Rem. & Bal. Code, § 4107, providing for a redetermination of the question of benefits to lands resulting from the maintenance of dikes, both within and without the district as originally established, is not unconstitutional as authorizing a disturbance of vested rights as determined by the verdict and judgment rendered at the time of the creation of the district; since the original judgment and verdict did not finally determine the amounts which each owner would be required to pay, either for cost of original construction or for maintenance thereafter, and were not strictly judicial in character, but determined only the maximum amount of benefits per acre to be derived by each landowner from the construction of the improvement, as provided by Rem. & Bal. Code, § 4106, and were not conclusive upon the question of benefits to be used as a basis for the levying of future maintenance charges, and the fact that the question of condemnation of land for the construction of the dikes, and the question of benefits resulting to lands within the district to be used as a basis for future levies of the assessment for the cost thereof, are triable in one proceeding by the same court and jury, under Rem. & Bal. Code, § 4106, does not render conclusive the question of benefits at the time of the creation of the district, the same being apart from the question of the award, which pertains strictly to the condemnation proceeding.

DRAINS—DIKING DISTRICTS—ASSESSMENT OF BENEFITS—PROPERTY LIABLE. 3 Rem. & Bal. Code, § 4107, providing that when it shall appear to the board of diking commissioners that any lands within or without the district as originally established should be assessed for the purpose of raising funds for future maintenance, or that assessments on land already assessed should be equalized in proportion to benefits received, they shall file a petition in the superior court asking that the original cause be reopened for further proceedings for the purpose of assessing the lands or equalizing the assessments already made, is not unconstitutional as authorizing the diking district to levy taxes on land outside its boundaries, in violation of Const., art. 11, § 12, providing that the legislature shall have no

¹Reported in 143 Pac. 112.

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power to impose taxes upon counties, cities, towns, or other municipal corporations, but may vest in the corporate authorities thereof the power to assess and collect taxes for such purposes, since it is a special tax levied according to benefits resulting to the land to be charged therewith, and not according to value, as is required in the levying of general taxes; and it is not a violation of legislative power that the tax is imposed by officers in whose election the owners of land have no voice.

SAME. The act, 3 Rem. & Bal. Code, § 4107, is not unconstitutional in that it authorizes the exercise of extra-territorial jurisdiction and enables the taxing of land outside the district which may be within another district, since the charges are measurable only by the benefits resulting to the land charged.

STATUTES—TITLE AND SUBJECTS—DIKING DISTRICTS. The title to the Laws of 1913, p. 267 (3 Rem. & Bal. Code, § 4107), "An act relating to dikes and drains, providing for assessments according to benefits, authorizing the incurring of obligations in cases of emergency, and validating certain warrants theretofore issued for such purposes, and amending certain sections of the code," is not invalid as embracing more than one subject; since the provision of the act authorizing the diking commissioners, in cases of emergency, to incur additional obligations and issue warrants in excess of their annual estimate of the cost of maintenance of the diking system, which warrants shall be valid and legal obligations of the district, and validating warrants theretofore issued, does not constitute an independent subject, but is all germane to the general title, and not in violation of Const., art. 2, § 19, providing that no bill shall embrace more than one subject, and that shall be expressed in its title.

Certiorari to review orders of the superior court for Skagit county, Houser, J., entered March 23, 1914, in proceedings to determine benefits to lands within a diking district. Affirmed.

A. R. Hilen and Thos. Smith, for relators.

Brawley & Hammack, for respondents.

PARKER, J.—The commissioners of Diking District No. 1 of Skagit county seek, through a proceeding in the superior court for that county, to have the benefits to the lands within the district, resulting from the maintenance of the dikes of the district, again determined; and also to have the benefits

to certain lands outside of, and near the boundaries of, the district, resulting from the maintenance of the dikes of the district, determined; to the end that the maintenance of the dikes of the district may become a charge upon all of such lands in proportion to benefits therefrom based upon present conditions. The proceeding was prosecuted in the superior court under chap. 89, p. 267, Laws of 1913 (3 Rem. & Bal. Code, § 4107), which is amendatory to the diking district law, found in Rem. & Bal. Code, § 4091 *et seq.* (P. C. 151 § 1 *et seq.*). The superior court having assumed jurisdiction of the proceeding upon petition of the drainage commissioners, overruled demurrers of these relators to the commissioners' petition, challenging the jurisdiction of the superior court, and the court being about to proceed with the trial of the question of benefits resulting to relators' property from the maintenance of the dikes of the district, the relators caused the proceeding to be brought to this court by *certiorari*, and seek the setting aside and annulment of the proceedings and the reversal of the orders of the superior court made therein, upon the ground that the amendatory act of 1913, authorizing the proceeding, is unconstitutional, and that, therefore, the superior court is proceeding without jurisdiction.

Diking district No. 1 of Skagit county was duly organized, and the benefits to lands lying within its boundaries resulting from the dikes to be constructed and maintained therein were determined by verdict of a jury and judgment of the court rendered in 1897, in pursuance of the provisions of the diking district law as then existing. Rem. & Bal. Code, § 4091 *et seq.*; Laws of 1895, p. 304. Thereafter, the dikes were constructed as originally contemplated, and the cost thereof, and also the cost of their maintenance since then, made a charge upon the lands within the district in proportion to the benefits so determined. In January, 1914, the commissioners of the district commenced this proceeding in the superior court under the amendatory act of 1913, against

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these relators and other owners of lands both within and without the district, to have the benefits to such lands resulting from the maintenance of the dikes made a charge upon all of such lands in proportion to benefits, based upon present conditions.

It is first contended by counsel for relators, especially in behalf of those relators owning lands within the district, that the act of 1913 is unconstitutional in that it, in effect, authorizes the disturbing of their vested rights in the verdict and judgment which, at the time of the creation of the district, determined the question of benefits to their lands resulting from the construction and maintenance of the dikes of the district. That judgment, they insist, became the fixed and final basis for all time upon which the expense of maintaining the dikes of the district, as well as the acquisition of lands therefor by eminent domain proceedings and the original construction thereof, must be apportioned and charged against their lands. This burden upon relators' lands which are within the district will be materially increased and will be materially lessened upon other lands within the district if the present claims of the diking commissioners are successfully maintained; since it will result in determining the benefits to their lands to be greater and the benefits to land of other owners in the district to be less than as determined by the verdict and judgment rendered upon that question at the time of the creation of the district. The relators' claim of vested rights in the result of the original verdict and judgment is apparently rested upon the theory that such determination has all the force and effect of a judgment rendered in litigation between private parties, wherein the judgment awards money in a specified amount, or specific property to a party. If the judgment determinative of the benefits rendered at the time of the creation of the district is of this nature, the settled rules of constitutional law would seem to support the contention made by counsel for relators, since to disturb such a judgment, other than by the usual modes of review,

would be to interfere with vested rights in violation of constitutional guaranties. Counsel for relators cite and rely upon the following decisions of this court: *Bettman v. Crowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104; *Fischer v. Kittinger*, 39 Wash. 174, 81 Pac. 551, in all of which cases, vested rights were involved which had been settled by the rendition of judgments of that nature.

This leads to the inquiry, What is the nature of the original determination of the question of benefits by the verdict and judgment of the court, rendered at the time of the creation of the district? Is it a final determination, binding upon the district and the owners of land therein for all time, as to the measure of the contributions to be exacted from them for the maintenance of the dikes of the district, or is the question of benefits to their land subject to be again determined as a basis for charges to be made against their lands for maintenance of the dikes of the district? Now, the original judgment did not finally determine the specific amounts which the owner of each tract of land would be required to pay, either towards the cost of the original construction of the dikes of the district, or towards the cost of their maintenance thereafter; but only determined, using the language of the diking law, Rem. & Bal. Code, § 4106 (P. C. 151 § 31), "the maximum amount of benefits per acre to be derived by each of the land owners from the construction of said improvement," which determination became the basis for the assessment tax to be levied from time to time in that proportion against the several tracts of land within the district to pay the cost of the maintenance of the dikes of the district as well as the cost of their original construction. Rem. & Bal. Code, §§ 4110, 4121, 4128 (P. C. 151 §§ 39, 61, 75). In 1913, the legislature passed the act here involved, amending the law as it existed at the time of the

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original determination of benefits to the land within the district, providing, among other things, as follows:

"If at any time it shall appear to the board of diking commissioners that any lands within or without said district as originally established are being benefited by the diking system of said district and that said lands are not being assessed for the benefits received, or that any lands within said district are being assessed out of or not in proportion to the benefits which said lands are receiving from the maintenance of the diking system of said district, and said board of diking commissioners shall determine that certain lands, either within or without the boundaries of the district as originally established, should be assessed for the purpose of raising funds for the future maintenance of the diking system of the district, or that the assessments on land already assessed should be equalized by diminishing or increasing the same so that said lands shall be assessed in proportion to the benefits received, said commissioners shall file a petition in the superior court in the original cause, setting forth the facts, describing the lands not previously assessed and the lands the assessments on which should be equalized, stating the estimated amount of benefits per acre being received by each tract of land respectively, giving the name of the owner or reputed owner of each such tract of land, and praying that such original cause be opened for further proceedings for the purpose of subjecting new lands to assessment or equalizing the assessments upon lands already assessed or both." Laws of 1918, p. 267 (3 Rem. & Bal. Code, § 4107).

This is followed by provisions for service of summons upon the owners of lands within the district, and the owners of lands without the district sought to be charged, and for a new trial of the question of benefits, substantially as in the original diking district law. While the question of benefits was, under the provisions of the diking district law as it existed at the time of the creation of the district, determined by a jury in a proceeding in the superior court, upon which a judgment was rendered in that court, we are constrained to hold that such verdict and judgment was not conclusive for all time upon the question of benefits to be used as the basis

for apportioning the levy of the cost of future maintenance of the dikes of the district, to the extent that the legislature could not constitutionally provide for a re-determination of the question of benefits, both to lands within and without the district for that purpose. Such original determination of benefits was judicial only in the sense that assessment and equalization of the value of property by administrative officers for general taxation is judicial; so far, in any event, as the cost of future maintenance of the dikes of the district and apportioning of the cost thereof as a charge against the benefited lands is concerned. That is not a question which the constitution requires to be determined by a jury or a court, but a question which could have been, by the legislature, committed for determination to administrative officers, as the question of benefits in ordinary local improvements is so committed. *Commissioners etc. v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042. It was not even, as in ordinary local improvements, a final determination of the amount which was ultimately to become a charge against each tract or parcel of land, based upon proportional benefits; but it was only a determination of the maximum benefits resulting to each tract or parcel, to become a basis for apportioning the future cost of the maintenance of the dikes of the district as well as the cost of their construction. That determination may be likened to the assessment and equalization of land values by assessing officers as a basis for general taxation, notwithstanding the benefits to, instead of the value of, the land become the measure of the amount of tax to be charged against the different tracts from time to time as the expense is incurred. We are quite unable to understand why the legislature may not provide for a re-determination of the question of benefits from time to time, at least as a basis for maintenance expenses, the same as it may provide for a revaluation of land from time to time as a basis for general taxation. Conceding, for argument's sake, that when the benefits were originally determined, such determination was

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final in so far as apportioning expense then incurred incidental to the construction of the dikes of the district is concerned, it does not follow that the maintenance costs of the dikes for all time must be charged and apportioned against the land upon the basis of that determination, and that the legislature is thereafter forever prohibited from providing for a redetermination of benefits as a basis for future levies for maintenance of the dikes.

Counsel for relators call attention to our recent decision in *Seattle v. Krutz*, 78 Wash. 553, 139 Pac. 498, where we said, "Judgments in condemnation procedure do not differ from judgments in the ordinary proceedings in law or equity. They become final and any errors contained in them can only be corrected on appeal." Counsel invoke this rule, resting upon the assumption that the finding of the jury and judgment of the court thereon determining the benefits at the time of the creation of the district was a condemnation judgment, and therefore resulted in the relators acquiring vested rights thereunder. We do not so view that verdict and judgment. It is true that, under the procedure provided in the diking district law, the matter of the condemnation of land for the construction of the dikes and the question of benefits resulting to lands within the district from the construction of the dikes, to be used as a basis for future levies of the assessment tax, are triable in one proceeding by the same jury and court. Rem. & Bal. Code, § 4106 (P. C. 151 § 31), upon that subject, provides as follows:

"The jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to the state, by reason of the appropriation and use of such land, real estate, premises or other property for said improvement, and shall ascertain, determine and award the amount of damages to be paid to said owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting such land, real estate, premises or other property for the establishment of said improvement; and shall further

find the maximum amount of benefits, per acre, to be derived by each of the land owners from the construction of said improvement."

This manner of combining the trial of these questions, however, does not give to that portion of the verdict and judgment determining benefits any different force or effect than as if the question were determined by administrative officers apart from the questions of the award which pertain strictly to the condemnation proceeding. Of course, the award made by the jury, upon which the judgment was rendered, determining the amount the district should pay for land appropriated for the construction of the dikes, was a final determination upon that question, and resulted in vested rights being acquired both by the landowner and the district, which could not thereafter be disturbed by subsequent legislation; but that, so far as vested rights thereunder are concerned, is quite apart from the question of vested rights in the determination of benefits as a basis for the levying of future maintenance charges. We have had occasion to point out the distinction between eminent domain and local assessment proceedings, which must often be recognized in determining the rights of parties, even when there is, under the law, one proceeding, in form, wherein is tried both condemnation and special assessment issues. Clearly the question of benefits belongs to the latter. *Commissioners etc. v. Seattle Factory Sites Co.*, *supra*. We are of the opinion that the act of 1913 is not in violation of any constitutional provision, as authorizing an interference with vested rights resting upon judgments rendered in pure judicial proceedings.

It is next contended, in behalf of owners of land outside of the district, that the act of 1913 is unconstitutional in that it, in effect, authorized the diking district, which, it is assumed, is a municipal corporation, to levy and collect taxes on lands lying without its boundaries, and thereby to impose taxes upon owners of land who have no voice in the election of its officers, nor in the management of its affairs. This does,

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at first thought, seem to suggest a violation of the spirit of § 12, art. 11 of our constitution, which reads:

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The answer to this contention is found, however, in the fact that the levy of the cost of maintenance of the dikes of the district, as well as the cost of their original construction, is measurable by proportionate benefits resulting to the several tracts of land to be charged therewith, and not according to value as general taxes are required to be levied. In *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552, this constitutional provision was held not to have any reference to special taxes levied according to benefits. It is, therefore, not constitutionally imperative that local special assessments be imposed only by officers elected by the owners of land against which such assessments are charged. The tax being measurable by benefits, the legislature, we think, had the power to cause dikes to be constructed and maintained at the expense of benefited lands through any agency it deemed wise to provide for the creation of, even though the owners of the land to be so taxed have no voice whatever in the choosing of the persons composing such agency. We know of no constitutional provision standing in the way of such an exercise of legislative power, though it must be conceded that such an exercise of legislative power as this evidences in this particular seems to violate the spirit of our institutions; yet not so plainly in violation of any provision of our constitution as to warrant our holding the law void upon that ground.

It is also contended in this connection that the act of 1913 is unconstitutional in that it, in effect, not only enables the commissioners of the diking district to exercise extra-territorial jurisdiction, but it enables them in this case to exer-

cise jurisdiction over lands which are not only without their district, but are actually within the bounds of another district possessed of the same powers. Counsel cite and rely upon the decision of the supreme court of Michigan in *Baxter v. Robertson*, 57 Mich. 427, 23 N. W. 711, where township officers sought to exercise powers without the limits of their township and within the limits of another township, and their acts were held void, although seemingly sanctioned by legislative enactments; upon the ground, apparently, that townships in Michigan are constitutionally created municipalities, and that, therefore, the people or officers of one township can have no voice in the affairs of another township. If the question here were simply one of different municipalities occupying the same territory for the exercise to some extent of the same power for the same purpose, counsel's contention would be answered by our observations in *Paine v. Port of Seattle*, 70 Wash. 294, 304, 126 Pac. 628, 127 Pac. 580, where we noticed the occupancy of the same territory by the port district, the city of Seattle, and the county of King, all having in some measure the same powers. But counsel's contention, we think, is, in any event, answered by the fact that diking districts are municipal corporations only in a limited sense, being little else than local improvement districts, possessing no power whatever to incur obligations payable by general taxation. All of their obligations are payable by taxation levied according to benefits, and such taxation, as we have noticed, may be levied by any agency the legislature may deem wise to provide for.

We conclude that the act of 1913 is not unconstitutional because of its seeming authorization of the exercise of extra-territorial jurisdiction by the officers of a diking district, nor because of the authorization of the charging of the maintenance of the dikes of one district upon lands which may be in another district, since such charges are measurable only by benefits resulting to the land charged therewith.

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It is finally contended by counsel for relators that the act of 1913 is unconstitutional because its title embraces more than one subject, thereby violating section 19, article 2, of our constitution, which provides: "No bill shall embrace more than one subject, and that shall be expressed in its title." The title of the act reads:

"An act relating to dikes and drains, providing for assessments according to benefits, authorizing the incurring of additional obligations in cases of emergency, and validating certain warrants heretofore issued for such purposes, and amending sections 4107 and 4121 of Remington & Ballinger's Annotated Codes and Statutes of Washington."

The act consists of but two sections. Section 1 relates to the retrial of the question of benefits, and section 2 reads as follows:

"The board of commissioners of any diking district organized under the provisions of this act shall, on or before the first day of November, of each year, make an estimate of the cost of maintenance of the diking system in such district, which estimate shall include the cost of making any necessary repairs that it might become necessary to make in the maintenance of such system. Such estimate shall be for the succeeding year, and the amount so estimated shall be certified by the board of . . . commissioners to the auditor of the county in which such district is located, on or before said date, and the amount thereof shall be levied against and apportioned to the land in such district benefited by said improvement, in proportion to the maximum benefit originally assessed, and such amount shall be added to the general taxes against said lands and collected therewith: *Provided, however,* That in case of emergency not in contemplation at the time of making such annual estimate the diking commissioners may incur additional obligations and issue valid warrants therefor in excess of such estimate, and all such warrants so issued shall be valid and legal obligations of such district; and all warrants heretofore issued for such purposes under the provisions of this act, are hereby declared to be valid and legal obligations of the district so issuing the same."

the portion following the words "provided, however," being the change in the original section of the diking district law amended.

It hardly needs argument to demonstrate that the title to this act is clearly sufficient as a title to all that is contained in the body of the act. In support of their contention that it embraces more than one subject, counsel rely upon the decision of this court in *Percival v. Cowychee etc. District*, 15 Wash. 480, 46 Pac. 1035, where it was held that the title of an act showing its object was to provide for the organization and government of irrigation districts and the sale of bonds arising therefrom was not broad enough to embrace a provision in the act validating the indebtedness of a district previously organized. That decision, as we read it, involved a question of the title being too restricted to cover the subject-matter in the act, and did not involve the question of more than one subject in the act. In *Landy v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, where there was involved the question of more than one subject in the act, Justice Scott, speaking for the court, said:

" . . . an act of the legislature will not be declared void except in cases where the violation of this constitutional inhibition is most clear, and sound policy and legislative convenience require that this provision should be liberally construed."

Applying this rule to the case in hand, it seems quite clear to us that the question of validity of previously issued warrants for the payment of maintenance charges, which is claimed to be an independent subject, is sufficiently akin to the general subject being legislated upon that it should not be regarded as a separate subject within the meaning of the constitutional provision requiring legislative acts to be confined to one subject. *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791. We conclude that the act of 1913 is not unconstitutional upon this ground urged by counsel for relators.

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We do not desire to be understood as expressing any opinion upon the question of whether levies may be made other than for the cost of future maintenance of the dikes of the district, based and appropriated upon benefits to lands within and without the district which may be determined by the verdict of the jury and judgment of the court in this proceeding in the superior court. That levies may be so made for future maintenance, we are convinced, and we need go no further to hold that this law is constitutional. Whether levies made to pay existing indebtedness of the district incurred for the construction of, or past maintenance of, the dikes must be made upon the basis of benefits originally determined or upon the benefits to be determined in this proceeding, is a question we are not here required to determine.

We conclude that the learned trial court was not proceeding in violation of any constitutional limitation, but lawfully; and that its orders must be affirmed, and the cause remanded for further proceeding.

It is so ordered.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11194. *En Banc*. September 16, 1914.]

SMITH SAND & GRAVEL COMPANY, *Appellant*, v.

D. C. CORBIN, *Respondent*.¹

APPEAL—REVIEW—NEW TRIAL—GROUNDS. Where the court in granting a new trial orally stated the reasons therefor, but the formal order failed to state the grounds on which it was granted, the court will, on appeal, examine the whole record, and if it discloses any ground warranting the granting of a new trial, the order will be affirmed.

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—CONTRACTS—TIME FOR PERFORMANCE. A written contract for the removal of rock at a stated price per cubic yard, but specifying no time for removal, thereby implying a reasonable time within which the work should be performed, cannot be varied by evidence of an oral agreement that such time would be allowed as would be required to crush and dispose of the rock by sale at a profit.

EVIDENCE — PAROL EVIDENCE — CONTRACTS — CONTEMPORANEOUS AGREEMENT. Although a contract be considered incomplete so as to admit of parol evidence showing a contemporaneous agreement relating thereto, the evidence to be admissible must not be inconsistent with, or repugnant to, the plain intention of the parties as expressed or implied by the written contract.

CONTRACTS—BREACH—LOSS OF PROFITS—CONSTRUCTION. In an action for damages for breach of a contract for the removal of rock from defendant's premises, under which plaintiff had the admitted right to do as it pleased with the rock removed, damages for loss of profits cannot be recovered without showing that defendant terminated the contract before a reasonable time for removal of the rock, not that the contract was terminated before a reasonable time for crushing and selling the rock at a profit.

EVIDENCE—PAROL EVIDENCE—CONTRACT—CONSIDERATION. Where a contract for the removal of rock at a stated price per cubic yard specified no time for the removal of the rock, a reasonable time being implied for performance, evidence of a contemporaneous oral agreement that plaintiff would be allowed such time as would be required to crush and dispose of the rock by sale at a profit, is not admissible as showing an additional consideration for the contract, since proof of such consideration would vary or defeat the terms of the written contract.

¹Reported in 142 Pac. 1163.

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Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered January 2, 1913, granting a new trial, after a verdict for the plaintiff, in an action on contract. Affirmed.

O. C. Moore, for appellant.

Allen & Allen, for respondent.

ON REHEARING.

ELLIS, J.—The opinion of Department One on the first hearing of this case will be found in 75 Wash. 635, 135 Pac. 472. We restate the facts necessary to a discussion of what we now deem the decisive question. This is an action for damages for an alleged breach of contract. On July 29, 1909, by a contract in writing, the plaintiff agreed to remove all rock from the defendant's land in Spokane to a level of six inches below the grade of the adjoining street, and the defendant agreed to pay therefor at the rate of fifty cents a cubic yard. There was no express provision as to the time within which the work should be performed. There was no provision, either expressed or implied, as to what disposition the plaintiff should make of the rock when removed or as to whom it should belong. The complaint, so far as here material, set out two causes of action. The first merely demanded a balance of \$3,188, claimed to be due for rock actually removed. The substance of the second was, that between October 3, 1910, and March 24, 1911, the defendant gave the plaintiff several notices in writing demanding a removal of its machinery and equipment from the land, the last of which contained a formal declaration that the contract had become null and void and was rescinded by the defendant for unreasonable delay and failure of performance by the plaintiff; that in March, 1911, defendant took possession of the land, prevented the plaintiff from removing the rock, and, over the plaintiff's protests, removed all of the rock himself. It is then alleged:

"That, in addition to the sum of fifty cents (50c) per cubic yard, which defendant, by the terms of said contract, stipulated to pay plaintiff for the removal of said rock which by oral understanding and agreement between the parties was to become, when excavated, the property of this plaintiff, plaintiff would have been able to sell and dispose of said thirteen thousand (13,000) yards of rock in a manner and at a price which would have enabled plaintiff to realize in connection with the amount agreed to be paid to plaintiff by defendant, the net sum of ninety-four (94c) cents per cubic yard for the removal of said rock over and above all expenses incurred in connection with the removal thereof, and plaintiff alleges that it was at all times willing, able and desirous of removing said rock and completing said contract according to the terms thereof, and that had it been permitted to do so, it would have derived a net profit of ninety-four cents (94c) per cubic yard on each and every cubic yard of rock remaining on said premises, making a total of twelve thousand two hundred and twenty (\$12,220) dollars."

The defendant, by answer to the first count, admitted a balance due to plaintiff, including interest, amounting to \$1,440. The answer to the second count is, in substance, a denial of any violation of the contract in giving the notices, taking possession, and preventing a further removal of rock by the plaintiff, and a "further answer and defense" to the effect that the plaintiff did not proceed with reasonable diligence and did not complete the removal of the rock within a reasonable time as contemplated by the terms of the contract and the law applicable thereto, by reason whereof the defendant had the right to, and did, by notice, terminate the contract and rightfully reenter. The jury found for the plaintiff in the sum of \$5,013, without segregation of the amount found on each cause of action. Judgment was entered against the defendant. He moved for a new trial. From an order granting this motion, the plaintiff appealed.

The court, in ruling orally upon the motion, gave three reasons for granting a new trial: (1) that he had committed

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error in his instructions to the jury touching the burden of proof; (2) that he had erred in permitting any testimony to be introduced on the second cause of action; (3) that in any event the verdict was against the evidence. The formal order, however, did not state the grounds. Even under our decision antedating this appeal, which was taken prior to the adoption of the rule to that effect, in *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, we are at liberty to examine the whole record, and, if it discloses any ground warranting the granting of a new trial, the order appealed from must be affirmed.

Such an examination convinces us that the so-called second cause of action failed to state a cause of action. It pleaded an oral agreement, contemporaneous with the written agreement, and sought to put upon this oral agreement a construction which would vary the terms and legal effect of the writing. It is a rule of universal application that a written contract complete in itself, or in so far as it is complete in itself, cannot be contradicted, explained, enlarged, varied or controlled by extrinsic evidence of a different contemporaneous parol agreement. *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 Pac. 621. It is elementary that if a contract specifies no time, the law implies that it shall be performed within a reasonable time. 9 Cyc. 611. It is also well established that the legal effect of a written contract, though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence, than if the legally implied effect had been expressed in the written terms.

"The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language."

See, also, *Barry v. Ransom, Admr.*, 2 Kern. (N. Y.) 462; *LaFarge v. Rickert*, 5 Wend. (N. Y.) 187; *Creery v. Holly*, 14 Wend. (N. Y.) 26; *First National Bank of St. Charles v. Hunt*, 25 Mo. App. 170; *Thompson v. Ketcham*, 8 Johns.

(N. Y.) 190; *The Delaware*, 14 Wall. (U. S.) 579; 2 Parsons, Contracts (8th ed.), 551, 552 (star page); 17 Cyc. 570. The legal implication of a reasonable time to perform the thing or do the act expressly undertaken in a written contract which specified no time of performance, is as much within the protection of this rule as any other provision of the contract, whether expressed in terms or resulting in legal effect from the things expressed.

"The contract between these parties was in writing, but is silent as to the time when these frames and sash were to be furnished or delivered by the plaintiff. Upon the trial, parol evidence was admitted, over plaintiff's objection and exception, of a contemporaneous oral agreement that they were to be furnished and delivered as fast as needed in the construction of the building. Where a contract is silent as to the time of performance, the law implies that it was to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself. *Stone v. Harmon*, 31 Minn. 512, 19 N. W. Rep. 88; *Driver v. Ford*, 90 Ill. 595. It was therefore error to admit parol evidence of a contemporaneous oral agreement to establish a time for delivery different from that which the law would imply from the writing itself." *Liljengren Furniture & Lumber Co. v. Mead*, 42 Minn. 420, 44 N. W. 306.

See, also, *Driver v. Ford*, 90 Ill. 595; *Self v. King*, 28 Tex. 552; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Blake Mfg. Co. v. Jaeger*, 81 Mo. App. 239; 2 Parsons, Contracts (8th ed.), 661 (star page).

Even if the contract be considered incomplete in that it did not provide what disposition the appellant should make of the rock, so as to admit parol evidence of a collateral contemporaneous agreement covering that matter, evidence of such an agreement, to be admissible, must not be inconsistent with, or repugnant to, the plain intention of the parties, as expressed in, or legally implied by, the written instrument. This is true even in cases where it is admitted that the whole

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agreement of the parties was not reduced to writing. *Hutchinson Mfg. Co. v. Pinch*, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Case v. Phoenix Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Minnesota Thresher Mfg. Co. v. Grant City Lumber & Hardware Co.*, 81 Mo. App. 255; *Kelley v. Collier*, 11 Tex. Civ. App. 353, 32 S. W. 428.

In the case before us, the appellant, by its so-called second cause of action, did not merely seek to plead facts showing what was a reasonable time for the removal of all the rock from the respondent's land—the only thing which it had bound itself to do by the terms of the written contract—but sought to set up and substitute for such reasonable time, an oral agreement that the appellant should have such time as would be required to crush and dispose of the rock by sale at a profit as the agreed time for the removal of the rock. Such an agreement would change the whole tenor of the written contract. It would extend the time of performance beyond the legally implied reasonable time for the removal of all the rock to such time as the appellant might find necessary to crush the rock and sell it at a profit. This would contradict and change the whole scope and meaning of the written contract touching a stipulation upon which the writing is clear and unambiguous. The written contract was not for a sale of rock, but for the removal of rock; hence no damages could be recovered for a loss of profits upon the rock without first showing that the respondent terminated the contract and reentered before the expiration of a reasonable time for the removal of all the rock; not before the expiration of a reasonable time for crushing and selling of all the rock at a profit. These two things are so widely different that a contract for the one is wholly inconsistent with an agreement for the other. The respondent gave notice to the appellant in March, 1911, almost two years after the contract was made. The evidence seems clear that a reasonable time had

elapsed for the removal of all of the rock. The president and manager of the appellant company admitted that the rock might have been removed by the employment of a reasonable number of men in a very much shorter time. He admitted that the only reason the rock was not removed was because there was no sale for it. The respondent does not deny that appellant had the right to do as it pleased with the rock removed, which is, in fact, the sum and substance of appellant's second cause of action. This was a matter wholly immaterial to any issue in the case, in the absence of pleading and proof that performance by removal of the rock was prevented by respondent before the expiration of the reasonable time necessary for that purpose. *Pope v. Terre Haute Car & Manufacturing Co.*, 107 N. Y. 61, 13 N. E. 592. No such allegation appears. No such proof was made. No sufficient basis was laid, either in allegation or proof, for the recovery of lost profits on sale of rock. An admission that the appellant might have the rock when removed is a very different thing from a guaranty on the part of respondent that appellant could sell the rock at a profit within a reasonable time for its removal, yet that, in effect, is the construction which the appellant seeks to put upon the only oral agreement pleaded. Evidence of the oral agreement so construed was clearly inadmissible.

The appellant invokes the familiar rule that an additional consideration to that mentioned in a written contract may be proved by parol evidence. Where, however, the effect of the added consideration sought to be proved would change or defeat the legal operation and effect of the written contract, or add new matter to a stipulation of the contract complete upon its face, such evidence is not admissible. It is not competent, under the guise of proving a consideration, to engraft upon the written agreement new terms and covenants by parol. 17 Cyc. 659; *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Adams v. Watkins*, 103 Mich. 431,

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61 N. W. 774; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. 162, 4 L. R. A. 826; *Anderson v. Continental Ins. Co.*, 112 Ga. 532, 37 S. E. 766. It seems clear that the only tendency of evidence of such a contract as that sought to be established by parol would be to prove, as an additional consideration of the written contract, a contemporaneous parol contract contradicting the terms, enlarging the scope, and varying the purpose of the contract as written, not merely matter going to the consideration for the performance of the work contemplated or by the written contract, which is the full extent of the rule. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

The appellant mainly relies upon two cases: *Gleason v. United States*, 33 Court of Claims Rep. 65, and *Carrico v. Stevenson* (Tex.), 135 S. W. 260. Neither meets this case on the facts. In the *Gleason* case, the written contract for digging a canal provided that additional time for performance should be allowed if delay is caused "by freshets, ice or other force or violence of the elements" as in the judgment of the engineer in charge "shall be just and reasonable." The court held that there was no discretion left in the engineer except as to the amount of time to be allowed, and that must be just and reasonable; that the engineer's reports from month to month that delays were caused by freshets preventing a completion of the work within the time agreed upon, conceded the conditions which called for an extension, and this bound the government to extend the time; that the contract, having been annulled within such reasonable time of extension, an element of damage would be the value of the material which, *by the terms of the contract*, was to belong to the contractor. The written contract itself furnished the basis of recovery; its breach the occasion. The same thing is true of the *Carrico* case, which involved a contract to clear land, the timber, by the terms of the writing, to go to the contractor. Even in those cases, it was not held that a rea-

sonable time for performance depended upon the time it would take to prepare and sell the material and timber at a profit.

The order granting a new trial is affirmed.

ALL CONCUR.

[No. 11979. Department One. September 16, 1914.]

ROBERT E. ROGERS, *Respondent*, v. MAGGIE ROGERS,
Appellant.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence in an action for divorce will not be disturbed on appeal, where it cannot be said that the findings are not sustained by a fair preponderance of the evidence.

DIVORCE—DEFENSES—RECRIMINATION—CONDONATION OF OFFENSES—EVIDENCE—SUFFICIENCY. In an action for divorce, the evidence is sufficient to show that matters pleaded in recrimination were condoned by defendant, where it appeared that, after abstracting certain letters from plaintiff's pocket written to him by certain women, one of which implied criminal intimacy with the writer, defendant continued to live with plaintiff and subsequently bore him another child; and other matters testified to by defendant as constituting misconduct on the part of plaintiff, were only capable of such inference by interpreting them in the light of her own construction.

DIVORCE—MISCONDUCT—CONDONATION OF OFFENSE. Condonation being a forgiveness with an implied condition that the offense shall not be repeated, misconduct of a party, long since condoned, will not be removed lightly or upon proof of slight delinquency, where set up as a recriminatory bar in a subsequent action for divorce brought by the offending party.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 24, 1913, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

¹Reported in 142 Pac. 1150.

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Nuzum, Clark & Nuzum (George H. Armitage, of counsel), for appellant.

Merritt, Oswald & Merritt, for respondent.

ELLIS, J.—This is an action for divorce. The complaint set up facts tending to establish the statutory ground of cruelty on the part of the defendant, consisting of abusive language, neglect of wifely duty, occupying a separate room, refusing to cohabit with the husband since the year 1908, refusing to speak to him for months at a time, and then only to interfere with his attempts to control their son Robert, fifteen years old; neglect of plaintiff and failure to care for him during two severe illnesses. The answer denied the allegations of the complaint, and set up, by way of an affirmative defense and matter in recrimination, that the plaintiff has disregarded his marriage vows and has associated with lewd women; that the defendant has, from time to time, forgiven him, on promises of reformation; that she believes the plaintiff is infatuated with some other woman and that he will eventually see his error and reunite with her in the making of a home, and prays that no divorce be granted. The reply was a traverse of the affirmative matters pleaded in recrimination.

There are two children the result of the marriage, a son now twenty-four years old and self-supporting, and a son now fifteen years old, who is in school. After a lengthy trial, in which the whole marital life of the parties was covered by the evidence, the court found, in substance, that the plaintiff is employed by the Northern Pacific Railway Company at a net salary of \$164 a month, has no other income, and the only property owned by the parties, community or separate, is a residence and \$325 in money; that the plaintiff's father is eighty-three years old, unable to earn a living, has no income, and plaintiff is compelled to support his father and stepmother out of his salary; that plaintiff and defendant were married at Helena, Montana, in March, 1886, resided

there and at Missoula, Montana, until 1902, when they moved to Spokane, Washington; that about April, 1908, they had an altercation touching their eldest son, Frank, and, since that time, they have not cohabited together, but lived in the same house, occupying separate rooms until July, 1913, when plaintiff left, and that they have since lived separate and apart; that certain letters in evidence, produced by the defendant, were written to the plaintiff more than seventeen years ago, and after that time, with full knowledge on her part, defendant and plaintiff lived together and cohabited as husband and wife until 1908; that whatever may have been the right of the defendant by reason of these letters, plaintiff's conduct in that regard had been condoned prior to the time the parties ceased to live together as husband and wife; that the defendant has unreasonable and narrow ideas as to the proper action of her husband, has criticised his talking with woman acquaintances in her presence and the presence of others, has treated the plaintiff cruelly by continuously nagging him, and objecting to his having, at any time, or under circumstances however proper, met or spoken to any woman in the presence of the defendant or otherwise, and would require her husband to conduct himself in a way unreasonable and unnecessary, and that such action and nagging conduct constitutes cruel treatment to such extent that the plaintiff should not be required to live with her; that since the altercation in 1908, defendant has manifested no love or affection for the plaintiff; has nagged and cruelly mistreated him to such an extent as to interfere with his peace of mind so that a continuance thereof would interfere with his duties to the railway company; that, except as evidenced by the letters referred to, written more than seventeen years ago, there is nothing in the plaintiff's conduct justifying the defendant in her nagging conduct toward him; that since that time, up to July, 1913, while he resided in the same house, there was no reason why she should not have

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ceased her nagging, abuse and mistreatment of the plaintiff, and that he was justified in leaving.

Upon appropriate conclusions of law, the court entered a decree divorcing the parties, awarding to defendant the home and household goods, the custody of the minor son, Robert, and a monthly alimony of \$50, and \$50 attorney's fee, and awarding to the plaintiff the money in the bank, a motor boat, and certain strictly personal effects. From this decree, the defendant appeals.

The appellant's argument is directed to two principal contentions: (1) That the respondent's evidence, independently of any consideration of the matter in recrimination, was insufficient to sustain the findings of fact and insufficient to warrant a decree of divorce on the ground of cruelty; (2) that, in any event, the court erred in finding that the matters pleaded and proved by way of recrimination had been condoned by the appellant.

(1) In a hotly contested action for divorce, such as this, wherein the differences, bickerings and mutual criticisms of years have culminated in a final fixed attitude of mutual animosity, the strongest personal feelings of the parties are profoundly stirred. Their testimony, to which, of necessity, resort for the truth must, in the main, be had, is usually directly conflicting and colored, not alone by fancied self-interest, but by the accumulated bitterness of years. In such a case, it is obvious that the reader of the written record of their testimony is at a marked disadvantage as compared with the trial judge who heard it, in the effort to arrive at the actual truth of the situation and meet it with even justice to the parties, and at the same time conserve the best interests of the children and of society. We have, therefore, frequently announced that, though in a divorce suit the trial here is one *de novo*, the findings of the trial court upon conflicting evidence are entitled to great weight. We are in no position to pass upon the credibility of the witnesses. *Broгна*

v. Brogna, 67 Wash. 687, 122 Pac. 1; *Hale v. Hale*, 76 Wash. 34, 135 Pac. 481.

"In cases of this kind there is often an atmosphere apparent at the trial, sometimes elusive, but none the less palpable to the trial court, which is seldom fully manifested in the written record." *Dyer v. Dyer*, 65 Wash. 535, 538, 118 Pac. 634.

We have not only read the abstract of record, but, in large part, the statement of facts itself. Any effort to discuss the evidence in detail would be but a lengthy recital of a distressing story of unreasoning jealousy and distrust on the one hand, and of final exasperated indifference on the other, induced thereby. Such a discussion would not affect the result, but would only extend this opinion, to no possible profit. Any one reading the record could hardly fail to lay it down with the distinct conviction that whatever the grounds in past years for the appellant's jealousy, she has nursed it to such proportions that the respondent's assumed infidelity has become a fixed idea which nothing can eradicate. It is clearly as torturing to her as it is exasperating to him. It can hardly be doubted that her own happiness and peace of mind will be as much subserved by a divorce as will his. The evidence presents the conflict usual in such cases upon every issue of fact. We cannot say that the court's findings, so far as they relate to pure questions of fact, are not sustained by a fair preponderance of the evidence. Independently of the matter advanced in recrimination, the decree is clearly sustained by the evidence.

(2) The only real evidence of the matters pleaded in recrimination rests in certain letters which the appellant abstracted from the respondent's pocket in 1893 and 1896, purporting to have been written to him by certain women, one of which at least implied that the respondent and the writer of the letter had been guilty of criminal intimacy. Unquestionably, had the appellant then sought a divorce, these letters would have furnished *prima facie* proof of such miscon-

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duct as to sustain a decree in her favor. She brought no such action, and, so far as we are advised, threatened none. On the contrary, she continued to live with the respondent, and subsequently bore him a second son. In 1910, after the time when the court found she had ceased to cohabit with the respondent, she intercepted another letter from a woman whom both parties had met at the home of respondent's father in Coeur d'Alene, Idaho. This letter, it is admitted, never reached the respondent. It was a brief note, stating that the respondent had asked the woman to call upon him when she came to Spokane, but had not told her where to find him. It gave the information that she would not work the following Monday, and gave her address. There was no evidence that he ever wrote to, or saw, the woman afterwards, and he positively denied anything more than a passing acquaintance with her. The appellant testified to many other actions during the past seventeen years which she regarded as indicating a continuing lascivious disposition on the respondent's part, but, in order to be capable of this inference, they must be interpreted largely, if not wholly, in the light of her own construction. She said, "I wouldn't think he was doing the right thing if he spoke to any woman that I didn't take into my circle."

The appellant's contention, if we have correctly caught counsel's meaning, is that condonation can never be invoked as against matters pleaded in recrimination, but only where the conduct condoned is made the basis of an action for divorce by the condoning party. It is true, as argued by appellant, that a party who comes into court seeking a divorce is subject to the maxim that "he who comes into equity must come with clean hands," and it is true that the doctrine of recrimination is based upon this principle, and that it is held that a plaintiff is not entitled to relief, in that he does not come with clean hands, where he has provoked the injury of which he complains, or where he is guilty of marital misconduct of equal gravity. 1 Nelson, Divorce & Separation,

§ 425. These applications of this maxim, however, as the basis of recrimination, are no more inconsistent with the application of the doctrine of condonation than the same maxim would be as applied to an action by the plaintiff, setting up condoned misconduct of the defendant as the sole ground for divorce. Bishop defines condonation as follows:

"Condonation is the remission, by one of the married parties, of an offence which he knows the other has committed against the marriage, on the condition of being continually afterward treated by the other with conjugal kindness—resulting in the rule that while the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy." 2 Bishop, Marriage, Divorce & Separation, § 269.

In a recent case, we have defined condonation in practically the same way:

"Condonation is forgiveness with an implied condition that the injury shall not be repeated, and on breach of this condition the right to a remedy for former injuries revives." *Averbuch v. Averbuch*, 80 Wash. 257, 141 Pac. 701.

The doctrine of condonation is based upon a sound public policy which would not only discourage divorce, but also discourage improper conduct on the part of the parties. It puts a premium upon reformation by holding the forgiving party in good faith to the forgiveness so long as the offending party observes a correct course of conduct. If a condoned offense could at any future time be set up as a recriminatory bar to an action for divorce by the other party, it would have a tendency to remove all restraint from the conduct of the forgiving party, which would be contrary to the very reasons of public policy underlying the whole doctrine of condonation. Expressed in terms of contract, condonation is a barter of permanent forgiveness on the one hand for continual good behavior on the other. It was never intended as a barter of forgiveness for an immunity of the forgiving party from the consequences of his own or her own future marital delinquencies. Yet if a condoned offense may be set up in bar of an action for divorce against the forgiving party, the lat-

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ter would be the plain effect of the condonation. After reviewing many authorities, Bishop clearly states the logically resulting principle as follows:

“When a matrimonial offence is condoned, the party forgiven stands upright as to the other party, so long as he commits no breach of the condition on which all condonations proceed. This places the one forgiving under no new liberty to do evil; but if the condoned offence still operates as a recriminatory bar, the forgiving party practically obtained a license for himself when suffering the condonation to pass. And surely any construction of either a common law or a statutory rule, the effect of which is to license profligacy, or other ill conduct in the matrimonial relation, is to be avoided. Hence, in principle, a condoned offence is not an adequate bar in recrimination.” 2 Bishop, Marriage, Divorce & Separation, § 405.

We do not want to be understood as holding that a condoned offense may not be revived by subsequent misconduct of the forgiven party so as to be capable of being invoked as a defense by way of recrimination as well as a defense to an action for divorce for the condoned offense itself. Nor do we hold that the reviving misconduct must in itself and by itself be such as to constitute independent ground for divorce. To so hold would deprive revival of all practical utility. We do hold, however, that condonation will not be removed lightly or on proof of slight delinquency, nor on proof of facts warranting nothing more than a vague suspicion of subsequent wrongdoing. To hold otherwise would deprive condonation of every substantial benefit. The evidence in the case before us, to our minds, falls far short of presenting sufficient grounds for the revival of offenses clearly condoned by the appellant for seventeen years.

The forgiveness, which is the very essence of condonation, must be a real forgiveness. If the condoned offense is permitted to answer as an adequate and perennial excuse in law for years of yielding to jealousy, torturing and intolerable alike to both parties, then condonation is not real forgive-

ness, but a mere colorable counterfeit, binding the speciously forgiven party to a never ending castigation for ancient offenses, creating an atmosphere inimical alike to the happiness of the parties and that of their children.

The language used in two cases cited by the appellant is broad enough to sustain the claim that jealousy initiated by a plaintiff's own misconduct can never be the basis of an action on his part for a divorce. The facts in these cases were widely different from those here presented. The language, we apprehend, was not intended as expressing a broad, unvarying principle, but only as applicable to the facts there presented or to cognate facts. In both cases the conduct of the husband, apparently continuing up to the time of the crisis, was such as to attract general attention and to provoke gossip and adverse comment. *Spofford v. Spofford*, 18 Idaho 115, 108 Pac. 1054; *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277. We have been cited to nothing of that kind in the record here.

The decree is affirmed.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

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Syllabus.

[No. 11571. Department One. September 16, 1914.]

GREAT NORTHERN RAILWAY COMPANY *et al.*, *Appellants*, v.
THE CITY OF LEAVENWORTH, *Respondent*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT—ASSESSMENTS—VALIDITY—ENACTMENT OF GENERAL ORDINANCE. An assessment for a public improvement is not invalid for the reason that the proceedings therefor were initiated prior to the passage of a general ordinance covering the matter of local improvements, since 3 Rem. & Bal. Code, § 7892-1 *et seq.*, covering the subject of public improvements in cities and towns, though general and comprehensive in its terms, and directly conferring power upon the city council or legislative body to order improvements and any and all work to be done thereunder, and levy and collect assessments to pay the cost, does not prohibit a city from proceeding with an improvement without first passing a general ordinance, it appearing that each step in the proceedings prior to the passage of the general ordinance was directed by the city council, either by resolution or ordinance.

SAME—ENGINEER'S REPORT—DEFECTS—WAIVER—JURISDICTION. Defects in the report of a city engineer upon the initiation of an improvement, in that it failed to show the proportional amount of the cost to be borne by the property, and the lots benefited thereby, as provided by 3 Rem. & Bal. Code, § 7892-10 and the resolution initiating the improvement, are waived by failure to object thereto until hearing upon the assessment roll, and though some of the parties failed to appear in response to the notice and urge objections to the improvement, since the defects were not jurisdictional.

SAME — IMPROVEMENTS — CONTRACT — COMPETITIVE BIDS—USE OF PATENTED ARTICLE. An assessment for a street improvement is not invalid for the reason that the contract for the improvement involved the use of a patented article, as in violation of 3 Rem. & Bal. Code, § 7892-59, providing that contracts for local improvements shall be let upon competitive bids, where the owner of the patent furnished the city a license agreement in which it was agreed that the patented article would be furnished to the successful bidder, without reservation, which was done, and although the license agreement provided that it should apply only to contracts for 10,000 square yards or more, while the contract in question was but for 6,650 square yards, it appearing that the bidders relied on the license agreement when submitting their bids, and that no objection was raised to that provision of the contract until the filing of objections to confirmation of the assessment roll.

¹Reported in 142 Pac. 1155.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 10, 1913, in favor of the defendant, confirming an assessment roll for a local improvement, tried to the court. Affirmed.

Charles S. Albert, Thomas Balmer, and E. H. Fox, for appellants.

Louis J. Nelson and W. H. Pratt, for respondent.

MAIN, J.—This is an appeal from a judgment of the superior court of Chelan county, confirming the assessment roll for a local improvement in the city of Leavenworth, in two cases which had been consolidated for the purpose of trial.

On April 23, 1912, the city council of the city of Leavenworth adopted a resolution declaring its intention to improve certain streets of the city by paving the same with Bitulithic pavement. The Bitulithic is a patented pavement, owned and controlled by the Warren Bros. Company, a corporation of Boston, Mass. The resolution of intention directed the city engineer to submit to the council, at its meeting on May 14, 1912, a statement of the estimated cost and expense of the improvement, together with the other data specified in Laws 1911, ch. 98, p. 444, § 10 (3 Rem. & Bal. Code, § 7892-10). The resolution also contained a notification to the property owners that the city council, at its meeting on the night of May 14, 1912, would consider remonstrances against the making of the improvement. Publication of the resolution was made as required by the statute. On May 11, 1912, the city engineer addressed a letter to the mayor and city council in which he said he was presenting plans and specifications for the improvement. This letter stated that the assessed valuation of the district amounted to \$59,625; that the square area to be assessed was 382,340 square feet; that the approximate estimate of the cost of the improvement was about \$19,258, or \$2.50 per square yard; that to this amount \$962 should be added for engineering and inspection expenses.

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This report of the city engineer did not specify the amount of the cost to be borne by the improvement district. Neither did the diagram or print presented show the lots or parcels of land that would be specially benefited by the improvement, nor contain the estimated amount of the cost of such improvement to be borne by each lot. On May 14, 1912, that being the day fixed by the resolution, the Great Northern Railway Company, in writing, objected to the proposed improvement, upon the ground that the paving of the street was unnecessary and that the expense thereof was unwarranted. Objections in writing were also presented by other property owners. At an adjourned meeting of the council held on May 20, 1912, all the remonstrances were overruled. On May 28, 1912, an ordinance was passed providing for the improvement. This ordinance established a local improvement district and, among other things, provided that the cost and expense of the improvement should be borne by the property included in such district.

After the adoption of the specifications, a communication was received by the city council from the Warren Bros. Company, enclosing a Bitulithic mixture license agreement. This communication stated that it was desired by that company that the license agreement be set forth in the specifications, but if the city did not consider it best to so incorporate the entire agreement therein, gummed slips which were furnished by the company could be attached to the specifications, referring to the fact that the license agreement was on file. One of these gummed slips was, as requested by the company, attached to the specifications. By the license agreement, Warren Bros. Company agreed to furnish the Bitulithic pavement to any bidder to whom the contract might be awarded. The license agreement contained a provision that it apply only to contracts aggregating not less than 10,000 square yards. The amount of pavement to be laid, according to the ordinance, was 6,650 square yards.

On June 27, 1912, notice to contractors was published by the city, and in response thereto, three bids were received, one agreeing to lay the pavement for \$2.35 per square yard, another at \$2.33 per square yard, and a third, submitted by the Warren Construction Company, at \$2.28 per square yard. The bid of the Warren Construction Company was accepted, and on July 17, 1912, this company was awarded the contract for the improvement, by the city council.

The proceedings up to this point were taken by the city without the passage of any general ordinance covering the subject of local improvements at the expense of the property to be benefited. On September 10, 1912, the city passed a general improvement ordinance. Thereafter, and during the month of November, 1912, the city engineer prepared an assessment roll to cover the cost of the improvement, and notice was published by the clerk that, on January 7, 1913, the city council would consider the roll and objections made thereto by property owners affected. Prior to the date fixed for the hearing, the appellants filed objections to the confirmation of the roll. At the meeting of the city council on the night of January 7, 1913, the objections were overruled, and on the 21st, an ordinance was passed approving and confirming the roll. In due time thereafter appeals were prosecuted to the superior court. The cause was tried in the superior court on March 3, 1913, and resulted in a judgment confirming the assessment roll. From this judgment, the present appeal is prosecuted.

This appeal presents three questions: First, was it necessary for the city of Leavenworth to adopt a general ordinance covering the subject of local improvements and assessments therefor before initiating the proceeding for the improvement here involved; second, was the failure of the city engineer to submit to the council, as required by the statute, a statement of the proportionate amount of the cost of the improvement which should be borne by the property within the proposed assessment district, and a diagram or print

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showing thereon the lots, tracts, and parcels of ground to be specially benefited thereby, and the estimated amount of the cost of the improvement to be borne by each lot, a jurisdictional defect rendering the assessment void; and third, was the contract for the improvement let upon competitive bids?

I. The first question is, whether the city council had the power to initiate the improvement and proceed with the same up to the point of letting the contract therefor without first having passed a general ordinance covering the matter of local improvements. At the legislative session for the year 1911 (Laws of 1911, ch. 98, p. 441; 3 Rem. & Bal. Code, § 7892-1 *et seq.*), a law was passed covering the subject of local improvements in cities and towns. This act, while not covering all the steps necessary in the initiation and prosecution of a local improvement, is yet comprehensive in its terms. By § 67 (3 Rem. & Bal. Code, § 7892-67), it is made to "apply to all incorporated cities and towns in this state, including unclassified cities and towns operating under special charters." By § 71 (3 Rem. & Bal. Code, § 7892-71), it is provided that the "act shall supersede the provisions of the charter of any city of the first class" which may be inconsistent therewith. It is also provided that all acts and parts of acts enumerated in the schedule, and all acts and parts of acts in conflict with the provisions of the act itself, are repealed. Section 60 (3 Rem. & Bal. Code, § 7892-60), provides that, "The council of each city and town shall pass such general ordinance or ordinances as may be necessary to carry out the provisions of this act. Thereafter all proceedings relating to local improvements shall be had and conducted in accordance with this act, and the ordinances of such city or town relating to local improvements." In various sections of the act, the general ordinance which this section provides for is referred to; but nowhere is the city inhibited from proceeding with a local improvement without first having passed the general ordinance. By § 6 of the act, the power is directly conferred upon the city council or

other legislative body to order a local improvement and any and all work to be done which shall be necessary to a completion thereof, and to levy and collect special assessments to pay the whole or any part of the costs.

In the present case, each step in the initiation and prosecution of the improvement, not covered by the act itself, was authorized by the action of the city council, either in the form of a resolution or a duly enacted ordinance. The act being general and comprehensive in its terms, and each step in the progress of the improvement prior to the passage of the general ordinance on September 10, 1912, being authorized by the city council, there seems to be no good reason for holding that the council had no power to proceed without first having passed the general ordinance. It is true that the act does not define the method by which the assessment shall be levied and collected, but before any assessment was levied or attempted to be collected in the present case, a general ordinance had been passed covering that detail, as well as others. Prior to the passage of this general ordinance, as already stated, each step in the proceeding was directed by the city council, either by resolution or ordinance. There is no claim of fraud, collusion or lack of sufficient notice. To now hold the assessment void because initiated prior to the passage of the general ordinance, would be to give to the act an unwarranted construction.

II. This improvement was initiated by resolution. Section 10 (§ Rem. & Bal. Code, §7892-10), of the local improvement law specifies the data which the city engineer shall furnish the council when an improvement is thus initiated. The resolution of the council which directed the engineer to make a report covered the requirements of the statute. In responding thereto, the engineer's report contained the assessed valuation of the district, the total number of square feet therein, the approximate cost of the improvement, detail specifications covering the improvement, and a diagram or print showing the streets affected. This report was de-

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fective as measured by the requirements of the resolution and § 10 of the statute, in that it failed to show the proportionate amount of the cost which should be borne by the property within the district, and the diagram or print failed to show the lots specially benefited thereby and the estimated amount of the cost of the improvement to be borne by each lot.

The argument is made that the report of the engineer required by the statute is jurisdictional, and because of the defects therein, the assessment is void. The question was raised for the first time upon objections to the confirmation of the assessment roll. The requirement that the engineer report to the council the matters which his report failed to cover is not a jurisdictional requirement in the absolute sense. That is, it is a requirement which might have been dispensed with by the legislature. The property owners who appeared and objected to the improvement being undertaken, did not point out any defect in, or urge any objection on account of, the report of the engineer. The question was raised for the first time in the form of an objection to the confirmation of the assessment roll. The defect in the engineer's report not being a jurisdictional matter, it was waived by the appellants, who appeared before the council in response to the notice and failed to offer any objection touching the report. This section of the statute was construed in *Chandler v. Puyallup*, 70 Wash. 632, 127 Pac. 293. In that case the notice required by the statute had not been published for the required length of time. Certain property owners appeared, however, in response to the notice, but failed to object thereto. It was held that the notice was not a jurisdictional requirement in the absolute sense, and that those appellants who actually appeared before the council in response to the notice had waived any objection thereto. It was there said:

"Nowhere in the evidence does it appear, nor do the appellants in their briefs claim, that the objection now urged was ever made before the city council or called to its attention. Having admittedly appeared in response to the de-

fective notice, it was incumbent upon them to show that they then objected to the sufficiency of the notice. Otherwise we must treat that objection as waived, unless the failure to publish the notice twice was jurisdictional in the absolute sense that it could not be waived in any manner. There is much reason in the view that this notice has nothing to do with the constitutionality of the law. Its purpose was not to accord a hearing upon the validity of the assessment or as to the benefit therefrom to the property within the district, but to accord a hearing as to the limits of the district and as to whether the district should be formed at all. The publication of the initial resolution or ordinance antedating as it does any assessment, cannot affect the constitutional requirement as to due process of law one way or another. The constitutional requirement is met by the fact that the lien of the assessment, if questioned, can only be asserted and the property subjected to its payment by a suit in foreclosure. Rem. & Bal. Code, § 7710.

"But even assuming that the constitutional inhibition necessitates some notice of the initiation of the improvement, the constitution does not prescribe any particular form of notice. In view of that fact, the legislature might have provided for but one publication of the initial resolution, or might have provided for any other form of notice reasonably calculated to apprise the property owners of the intended improvement. To proceed under an imperfect publication was not to proceed without power. It was merely an irregular exercise of power. The appellants who actually appeared before the council in response to the notice, but failed to offer any objection as to the sufficiency of the notice, must be held to have waived that objection. (Citing authorities.)"

The rule appears to be that, where a property owner makes objection to the assessment proceeding upon certain specified grounds, he thereby waives other objections which are not jurisdictional in the sense that they cannot be waived. The rule as stated in Page & Jones on Taxation by Assessment, vol. 2, § 1029, is:

"If the property owner makes objection to the assessment proceedings upon certain specified grounds, such action is

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not merely an omission on his part to object on other grounds which he does not specify, but it also tends to mislead the public authorities to believe that the grounds of objection thus urged are the only grounds upon which the property owner complains of the assessment, and are the ones upon which he intends to rely. Accordingly, the conduct of the property owner in filing certain specified objections is held to prevent him from subsequently relying upon other and different objections to defeat the assessment."

Some of the appellants in this case it seems did not appear before the city council in response to the notice and urge any objection. Section 10 of the statute requires that the resolution shall contain a provision notifying all persons who may desire to object to the improvement to appear and present such objections at a meeting of the council at the time specified in the resolution. There is also a provision requiring the publication of this resolution as notice to the property owners that may be affected. It should be noted that the objection to the sufficiency of the engineer's report is one which could have been urged against proceeding with the improvement. The property owners are given legal notice to appear and present objections. Failing to appear in response to the notice, it would seem that they would be in no better position than those who appeared and did not interpose any objection to the report of the engineer. In Page & Jones on Taxation by Assessment, vol. 2, § 1027, it is said:

"In many statutes provisions are found which point out the method in which the property owner must object to defects or irregularities in the proceedings. It is generally held that if a fair and ample opportunity is given to the property owner to be heard by virtue of such statutory provision, he must take his objections in the manner pointed out by statute, and that if he does not object he cannot subsequently resist or attack the assessment for reasons which he might have urged in the method provided for by statute.

. . ."

Had the property owners appeared and urged their objections in the initial state of the proceedings, the council would have been in a position to correct the defects. Having failed to appear, and having permitted the improvement to proceed, and not having urged the objections until they were urged to the confirmation of the assessment roll, it would seem only reasonable to hold that the objections as to the defective report of the engineer had been waived.

Our attention has been called to, and reliance is placed upon, the case of *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441, as sustaining the contention that the failure of the city engineer to report all the data required by the resolution and statute was a jurisdictional defect and rendered the assessment void. In that case the court was construing a charter provision of the city of Tacoma, which differs somewhat from the present statute. This charter required that, after a resolution had been passed by the city council ordering the improvement, a diagram and estimate should be filed in the office of the board of public works for the instruction of all persons interested therein. If persons owning a certain amount of the property to be affected did not object within a time specified, the board of public works should proceed with the improvement. In that case, as shown by the opinion, no resolution was passed ordering the improvement. No attempt was made to file a diagram or estimate, and the notice given was defective. Under § 10 of the statute, *supra*, the report is required to be submitted to the council, and the improvement, if ordered, must be ordered thereafter by ordinance. In that case, there was not only no resolution or notice, as required by the charter, but there was no attempt to file a diagram or estimate. In this case there is no question raised relative to the sufficiency of the resolution and ordinance, and there was an attempt on the part of the city engineer to report the data required. To hold that this case is ruled by the *Buckley* case would be to extend the doctrine of that case. This, we think, should not be done. In *Kelker*

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v. *New Whatcom*, 16 Wash. 178, 47 Pac. 505, while the *Buckley* case was not then applicable, it was said:

"But while we would not extend the doctrine announced in that case as against a municipal corporation, we do not think that that case is applicable to the one at bar."

III. Can a city, under a statute which requires competitive bidding as a prerequisite to a contract for a street improvement, legally contract for street pavement which involves the use of a patented article? Section 59 (3 Rem. & Bal. Code, § 7892-59), of the local improvement law provides:

"All local improvements, the funds for the making of which are derived in whole or in part from assessments upon property specially benefited, shall be made either by the city or town itself, or by contract upon competitive bids. . . . The city or town shall have power to reject any and all bids."

This statute, by its terms, does not forbid the use of a patented article. Its purpose was to secure economy and honesty in the letting of contracts for local improvements, and to prevent fraud and collusion. *In re Petition of Anthony Dugro*, 50 N. Y. 513; *Saunders v. Iowa City*, 134 Iowa 132, 111 N. W. 529, 9 L. R. A. (N. S.) 392.

The authorities construing similar statutes may be divided into three classes: (a) Where the contract is for a patented article, and the owner of the patent has filed no agreement with the city agreeing to furnish the article to the city or any successful bidder, there is a conflict in the adjudicated cases. As a type of the cases denying the right of the city to make such a contract, may be cited: *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Fineran v. Central Bitulithic Pav. Co.*, 116 Ky. 495, 76 S. W. 415. As representative of the decisions taking the contrary view, reference may be made to *Hobart v. Detroit*, 17 Mich. 245; *In re Petition of Anthony Dugro*, *supra*. (b) Where the contract is for a patented article, or involves the use of a patented article, and an agreement by the owner of the patent is filed

with the city, in which it is stipulated that the article will be furnished to any successful bidder *who may be equipped* with the necessary appliances for laying the pavement, the authorities are likewise in conflict. The right reserved to the owner of the patent to determine who might be properly equipped for laying the pavement, being in effect the reservation of the power to determine to whom the contract might be let. And (c) where, as in the present case, the owner of the patent has stipulated with the city that the patented article will be furnished to the successful bidder, without a reservation, the authorities uphold the right to make the contract. *Saunders v. Iowa City, supra*; *Lacoste v. New Orleans*, 119 La. 469, 44 South. 267; *Tousey v. Indianapolis*, 175 Ind. 295, 94 N. E. 225; *Reed v. Rockliff-Gibson Const. Co.*, 25 Okl. 633, 107 Pac. 168, 138 Am. St. 937; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004; *McEwen v. Coeur d'Alene*, 23 Idaho 746, 132 Pac. 308; *Johns v. Pendleton*, 66 Ore. 182, 133 Pac. 817, 134 Pac. 312.

These cases are comparatively recent and are directly in point. With the exception of the *Reed* case, which involves a contract for what is known as Hassam paving, every one of them sustained a contract for Bitulithic paving under a license agreement filed with the city in identically the same terms as that which was filed with the city of Leavenworth. The reason underlying these decisions may be best presented by quoting an excerpt from *Saunders v. Iowa City, supra*. It is there said:

"What is meant by this statute is that there must be competition where competition is possible. This is the construction usually given to statutes which are not prohibitive in character. If the material, or part of it, is monopolized by patents, there cannot, of course, be absolutely free competition, and where that is impossible, it surely was not the intent of the legislature that all improvements should cease, or that antiquated methods only should be adopted. All that the law means, as we view it, is that in all cases where competition may exist, such competition shall be allowed by receiving

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bids, and in the absence of express prohibition there is nothing to warrant the exclusion of patented articles. The provision as to bidding regulates the exercise of a power and was manifestly not intended to limit it. And neither the public nor the parties benefited by the improvement should be deprived of the best and most approved pavements because full effect cannot be given to an act passed to regulate the exercise of a power expressly granted by other statutes. In other words, the provision as to competitive bidding has reference only to those cases where there may be competitive bidding and not to cases where some of the articles which enter into the work may be in the hands of particular individuals. Courts have never willingly blocked the wheels of progress. They should, and have at all times sought to, encourage and stimulate endeavor and to foster individual initiative, and while a great conservative force in government they do not consciously stand in the way of either mental or material advancement. The statute providing for letting a work of public improvement to the lowest responsible bidder was enacted to secure competition, to prevent fraud and defeat graft. It was enacted to remove as far as possible all favoritism and to secure the performance of public work at the lowest possible price; but it was not intended thereby to impose upon individuals the use of an article simply because it was old, nor thrust upon the people something that was inferior and antiquated simply because there might be competition as to that, but not in a newer and superior article. The statute does not say that no contract shall be let if there be but one bid, not that a bid shall be rejected because it includes the use of a patented article. This result is claimed by construction. An elementary rule in the construction of statutes is that they shall be given a reasonable and not an arbitrary interpretation. When this is done, but one result, as we think, can be reached. This is an age of improvement and of progress, and courts should do nothing which will deny municipalities the right to use the most modern methods and improvements unless it is clear that the legislature so intended."

In Elliott on Roads and Streets (3d ed.), vol. 2, § 711, it is said:

"It would seem that if there is all the competition that is possible in the nature of the case, the statute should be deemed

to be satisfied, as the legislature could not have intended an impossibility nor an absolute prohibition. Both reason and the weight of authority, therefore, support the doctrine that if the patentee relinquishes his exclusive right to the city for the use of any and all bidders who may obtain the contract, or agrees in advance that the successful bidder shall have the right to use the same, at a certain fixed royalty or reasonable price, and bidders are so notified and placed as near as may be upon an equal footing, the statute as to competitive bidding is satisfied. . . ."

It is claimed, however, that the case of *Siegel v. Chicago*, 223 Ill. 428, 79 N. E. 280, sustains the opposite view. There was a stipulation there filed with the city by the Warren Bros. Company, in which the company offered to furnish to any contractor bidding on the work the Bitulithic pavement. The court, however, construed the ordinance requiring the Bitulithic wearing surface to in effect restrict the right of bidding to the Warren Bros. Company, or such persons, firms or corporations as that company might choose to deal with. The decision in that case follows the rule laid down in *Dean v. Charlton*, *supra*, and other like cases. It fails to recognize the distinction which exists where the owner of the patented article has filed an agreement to furnish the article to any bidder, and where the contract is sought to be let for a patented article without any stipulation on the part of the owner thereof to supply it to the successful bidder.

The license agreement in the present case is attacked, however, because of a provision therein that it should apply only to contracts aggregating not less than 10,000 square yards, and the contract in this case being for only 6,650 square yards. A sufficient answer to this contention is that the various bidders submitted their bids apparently relying upon the license agreement. After the contract for the improvement had been awarded to the successful bidder, the Warren Bros. Company supplied the article, and the pavement was constructed. No question appears to have been

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raised relative to this provision of the contract until the objections to the confirmation of the assessment roll were filed.

The cases cited supporting the right of the city council to make the contract are sought to be distinguished, because it is claimed that the statutory or charter provisions there construed are not the same as the statute of this state, which requires competitive bidding. It is true that in none of the cases did the statute in terms specify "competitive bidding." Such terms as "lowest bidder," to the "lowest and best bidder," and to the "lowest responsible bidder" had been made use of. In construing these statutes and charter provisions, however, they were treated by the courts rendering the decisions as requiring competitive bidding. In a number of the decisions the terms "competitive bidding," "lowest bidder," and "lowest and best bidder" are used interchangeably. To attempt to make a distinction between a statute which requires "competitive bidding" and those which use the terms "lowest bidder," "lowest and best bidder," or "lowest responsible bidder," would be to draw a very fine line.

The judgment will be affirmed.

Crow, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

[No. 11948. Department One. September 17, 1914.]

MOY QUON, *Guardian etc., Respondent*, v. FURUYA COMPANY,
Appellant.¹

TRIAL—MISCONDUCT OF COUNSEL—SHOWING INDEMNITY INSURANCE. In a personal injury case, the rule that the wanton intrusion of the fact that defendant carries liability insurance is such misconduct of counsel as to warrant reversal, does not override the rule that a party may cross-examine adverse witnesses touching every relation tending to show interest or bias.

WITNESSES—CROSS-EXAMINATION—CREDIBILITY—INTEREST OR BIAS. In an action for personal injuries, it is not error, on cross-examination of a witness for defendant, to question him touching his connection as agent for an indemnity company with which defendant carried liability insurance, as showing interest or bias affecting his credibility.

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION WITH AUTOMOBILE—PROXIMATE CAUSE—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian struck by an automobile, an instruction is not erroneous in that it failed to tell the jury that, although they should find the defendant guilty of negligence in running down the plaintiff and in approaching the crossing without sounding a bell, gong or horn, it must find such negligence the proximate cause of the injury before plaintiff could recover, where the instruction, while not so advising the jury in terms, was qualified by the statement that plaintiff could not recover if the jury found the injury due to his own contributory negligence.

SAME. In such a case, an instruction is not erroneous in failing to tell the jury that violation of the speed ordinance must be found the proximate cause of the accident, where it recited that, if the jury found that plaintiff was injured by the automobile, and that it was driven in excess of the speed ordinance, defendant was guilty of negligence and plaintiff should recover for the injury, unless it was found that his negligence contributed to the injury.

APPEAL—REVIEW—ERROR INVITED BY APPELLANT. Error cannot be predicated upon the giving of instructions incorrectly stating the rule of last clear chance, where appellant's requested instruction was fully as objectionable as the instructions given.

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—AUTOMOBILES—LAW OF ROAD—INSTRUCTIONS. An instruction is not erro-

¹Reported in 143 Pac. 99.

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neous in that it assumed that appellant had no right to drive his automobile on the left-hand side of the street, since, though having the right to the use of any part of the street, injury resulting from a violation of the law of the road, constitutes negligence *per se*.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian struck by an automobile, it is not prejudicial error that the court, after correct instructions defining contributory negligence, in response to a remark of counsel for plaintiff, "that wouldn't be true if they were exceeding the speed limit," stated that that would be taken into consideration with the other instructions as to whether there was a violation of the speed limit, and that if defendant was violating the ordinance, the law would conclusively presume the defendant guilty of negligence, where the court had already instructed as to the reciprocal rights and duties of the parties, and clearly intended that the instruction should be taken into consideration with those already given.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for \$5,000, for personal injuries sustained by a pedestrian struck by an automobile, is not excessive, where plaintiff sustained a fracture of the skull, requiring the entire removal of a portion thereof, and developed epilepsy as a result of the injury, the final result of which is unknown to the physicians.

Appeal from a judgment of the superior court for King county, Pendergast, J., entered May 23, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Brightman, Halverstadt & Tennant, for appellant.

Kerr & McCord, for respondent.

ELLIS, J.—Moy Quon, as guardian *ad litem*, brought this action to recover damages from the defendant for personal injuries sustained by Moy Sue, an incompetent person, through being struck by the defendant's automobile. For convenience, Moy Sue will be referred to throughout as plaintiff and respondent. The accident happened at the intersection of Fourth avenue south and Jackson street, in the city of Seattle. The complaint charged that the automobile was being operated by defendant's driver at an excessive rate of

speed, and that no warning was given of its approach. The defendant's answer admitted that the automobile was in charge of its driver and collided with the plaintiff at the place in question, denied the charges of negligence, and set up, as an affirmative defense, contributory negligence on the part of the plaintiff. This defense was traversed by the reply. No question is raised as to the sufficiency of the evidence to take the case to the jury. We shall, therefore, point out only its salient features.

Jackson street runs east and west; Fourth avenue north and south. The automobile came down Fourth avenue from the north, and swung into Jackson street on the north side in a wide curve, to pass up Jackson street to the east. The plaintiff had left the sidewalk on Fourth avenue, near the intersection of these two streets, when he was struck by the automobile. The driver testified that he first saw the plaintiff when about thirty or forty feet from him; that the plaintiff was walking slowly, with his head down and his hands in his pockets; that the machine was running from ten to eleven miles an hour; that he sounded the horn and the plaintiff started back, when the machine struck him. Witnesses for the plaintiff testified that the speed of the automobile was from fifteen miles to twenty miles an hour; that no horn was sounded or other warning given, and that the speed of the automobile was such that, after striking the plaintiff, it skidded a considerable distance, and came to a standstill on the other side of Jackson street, near the curb. The plaintiff testified that he first saw the automobile when it was about thirty feet from him. Ordinances of the city in evidence limit the lawful speed at the place in question to eight miles an hour going upgrade, and four miles an hour going downgrade. The plaintiff's skull was fractured and he was otherwise severely bruised. He was removed first to the city hospital, where he remained for nine days, then to Minor hospital, where he remained until about December 1, then to Broadway hospital, where he remained until December 15, when he was

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taken in charge by his brother. He was operated upon for a depressed fracture of the skull. A piece of his skull was entirely removed, so that the scalp comes in contact with the membrane of the brain. During much of the time while he was in the hospitals, he was in a semi-conscious condition. He has developed epilepsy, which the doctors attribute to the injury. The trial resulted in a verdict in favor of the plaintiff for the sum of \$5,000. Defendant's motion for a new trial was overruled, and judgment entered accordingly. The defendant appeals.

The first claim of error is based upon the following incident: One McKee, a witness for the appellant, testified that the assistant manager of the appellant had visited the respondent in the hospital and propounded to him certain written questions; that he, McKee visited the respondent four or five times, on the last visit, November 1, 1912, asking him the same questions. Afterwards, he reduced what he claimed were the respondent's answers to writing, and, upon the trial, was permitted to read or detail the substance of these answers to the jury. While he was testifying, respondent's attorney interjected the following question: "You were up there as the agent of the insurance company, trying to settle this case?" A. "Yes, sir." Q. "That is what you are here for now?" A. "Yes, sir. Exactly." After McKee had finished his direct testimony, respondent's attorney, on cross-examination, developed the fact that McKee was claim agent for the International Casualty Insurance Company, with which the appellant carried liability insurance, and visited the respondent in that capacity. When the first question was asked touching this matter, counsel for the appellant moved to discharge the jury and continue the case for trial to a new jury. The request was refused. The appellant contends that the judgment should be reversed for this reason, if for no other.

In a personal injury suit, the fact that the defendant carries liability insurance is wholly immaterial on the main

issue of liability. Being essentially prejudicial to the defendant, its wanton intrusion by the plaintiff is positive error constituting ground for reversal. This is the established rule in this state. *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821; *Shay v. Horr*, 78 Wash. 667, 139 Pac. 604. This rule, however, was never intended to override the equally positive and salutary principle that a party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. Many facts wholly immaterial, and even positively prejudicial, on the main issue may be material as touching the credibility of a witness. When a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination. The supreme court of Pennsylvania, touching a situation closely parallel to that here presented, has said:

"It is always the right of a party against whom a witness is called, to show by cross examination that he has an interest direct or collateral in the result of the trial, or that he has a relation to the party from which bias would naturally arise. Such an examination goes to the credibility of the witness. *Ott v. Houghton*, 30 Pa. 451; *Batdorff v. Bank*, 61 Pa. 179. The right is not to be denied or abridged because incidentally facts may be developed that are irrelevant to the issue and prejudicial to the other party. This chance the party takes when he calls the witness.

"The defendant's witness in his examination in chief had testified that he was attorney for it. This was but a partial disclosure of facts that might create a bias, and it was competent for the plaintiff to show the full extent of the witness' relation to the parties in interest in defending the action. The defendant opened the door for this inquiry, and, as long

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as it was conducted in good faith for a legitimate purpose, the plaintiff was within his rights." *Lenahan v. Pittston Coal Min. Co.*, 221 Pa. 626, 70 Atl. 884, 885.

The following language of the Federal circuit court of appeals, sixth circuit, is also directly pertinent:

"The plaintiff did not seek to introduce the fact that the defendant was carrying employers' liability insurance. The matter was brought out upon cross examination, and properly and necessarily brought out. Mr. Furniss testified that he had telephoned Mr. Collier to send a physician to assist Dr. Wadlington, and Dr. Burns was recommended. Dr. Burns stated that he was employed through Mr. Collier by the insurance company to go to the city hospital in Whitford's case. The defense having thus brought Mr. Collier into the case, counsel for plaintiff had the right to ask, and the jury were entitled to know, who Mr. Collier was, and how this insurance company came to send Dr. Burns to the city hospital, as reflecting upon the precise position Dr. Burns occupied both as a physician and as a witness." *Wabash Screen Door Co. v. Black*, 126 Fed. 721, 725, 6.

See, also, *Genest v. Odell Mfg. Co.*, 75 N. H. 509, 77 Atl. 77.

This court has repeatedly sustained the same latitude in cross-examination of witnesses, and also in the examination of jurors on their *voir dire*. *Shoemaker v. Bryant Lumber etc. Co.*, 27 Wash. 637, 68 Pac. 380; *Perry v. Centralia*, 50 Wash. 670, 97 Pac. 802; *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367; *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233. Here the appellant, through its assistant manager, and the casualty company, through its claim agent, had plied the injured man, while he was in the hospital, with carefully written questions, and the claim agent was thereafter produced by the appellant as a witness for the purpose of discrediting the respondent's testimony. The claim agent also interviewed one of the respondent's witnesses, and took the stand for the purpose of discrediting his testimony. In pursuing this course, the appellant was acting entirely within its rights, but it thereby waived the immunity from inquiry as to its liability insur-

ance. By producing the agent of the casualty company as its witness, the otherwise immaterial fact of insurance became a material factor going to the interest or bias and consequent credibility of this witness. The distinction between the case here presented and those relied upon by the appellant is found in the fact that in those cases the matter of insurance was first intruded into the trial without reasonable excuse. In the case here, it was not only proper, but necessary that the jury be advised of the relation of the witness and his consequent interest in the suit, as a matter clearly bearing upon the credibility and weight of his testimony. We find no error of which the appellant can reasonably complain in the latitude permitted by the court in the cross-examination.

It is next claimed that the court erred in giving an instruction which recites, in substance, that an ordinance of the city of Seattle provides that no person shall drive an automobile upon approaching a pedestrian, or approaching a street intersection, or passing around a corner, without sounding a bell, gong or horn. The instruction then recites that the plaintiff alleges in his complaint that he was run down by the defendant's automobile at the intersection of Jackson street and Fourth avenue south, and that, in approaching the crossing, the driver neglected to sound any bell, gong or whistle, and that, in approaching the intersection of these streets, he ran upon the plaintiff, injuring him. The instruction continues:

"I instruct you that if you find from the evidence in this case that the servant of the defendant did approach said crossing and did run over and upon and injure said Moy Sue and did fail and neglect to sound any gong, bell or whistle, so as to warn said Moy Sue of the approach of said automobile, the defendant was guilty of such negligence in that behalf as to render him responsible to the plaintiff for damages unless you should find that said Moy Sue was injured by reason of his own contributory negligence, as hereinafter defined."

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It is conceded that a violation of the ordinance, in failing to give notice of approach by the driver of the automobile, would be negligence as a matter of law. It is contended, however, that this instruction is erroneous, in that it failed to tell the jury that, even if it found the appellant guilty of negligence, it must find that negligence the proximate cause of the injury, before the plaintiff could recover. It is true, the instruction did not so advise the jury in terms, but it did, in substance and effect, since it closed with the statement that if the jury found that the respondent was injured by reason of his own contributory negligence, he could not recover. We find no serious error in this instruction.

The next instruction criticized recites, in substance, that an ordinance of the city provides that it shall be unlawful to drive an automobile along Jackson street or Fourth avenue South at the intersection of these streets at a greater rate of speed than eight miles an hour, or to pass or cross any street intersection, including the intersection of these two streets, or around any corner, at a greater rate of speed than four miles an hour running down grade and eight miles an hour running up grade. The instruction continues:

"I instruct you that if you find from the evidence in this case that the said Moy Sue was injured as alleged by the defendant's automobile and that the same was being driven at a rate of speed in excess of 8 miles per hour or at a rate of 4 miles per hour, if you find that the grade was down grade, or 8 miles per hour if the grade was up grade, that the defendant would be guilty of negligence and Moy Sue would be entitled to recover for his said injuries, unless you find that said Moy Sue cannot recover by reason of his own negligence contributing to his said injury."

This is objected to on the same ground as the preceding instruction, namely, that the court failed to tell the jury that the violation of the speed ordinance must be found the proximate cause of the injury before the respondent could recover. For the same reason, the objection is not well founded. The closing words of the instruction clearly made want

of contributory negligence on the respondent's part a condition of the application of the prior part of the instruction. The jury could hardly have been misled by the failure to add in terms that the injury must be found to have resulted from appellant's negligence as the proximate cause.

The following instructions are also criticized:

"If you find from the evidence in this case that said Moy Sue was run down and injured by the defendant's automobile on or about October 7th, 1912, while crossing over Fourth avenue south at its intersection with Jackson street, and if you further find that said Moy Sue was so crossing said street, that his back was to the defendant's approaching automobile and that the person in charge of said automobile could, in the exercise of reasonable care, have seen and avoided running over and injuring said Moy Sue, and failed and neglected so to do, then I instruct you that your verdict in this case should be for the plaintiff for such sum as you may find from the evidence he is entitled to recover . . .

"I instruct you that if you find from the evidence that the driver of the automobile at the time it collided with the plaintiff, and immediately prior thereto, was proceeding on the right hand side of the street, as required of the ordinances of the city of Seattle, and was not moving at a rate of speed greater than 8 miles per hour, and after he saw, or in the exercise of reasonable care should have seen, the plaintiff in a place of danger, used every means at hand to avoid striking and injuring the plaintiff, then your verdict must be for the defendant."

It is urged that, under the rule announced in *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, these instructions incorrectly state the rule of last clear chance. It is true that the instructions are faulty in that they fail to mark the distinction between the application of that rule where the driver of the automobile actually saw the respondent in time to avoid the injury, and where the driver, by the exercise of reasonable care, might have seen and appreciated the respondent's danger in time to avoid the injury. In the first situation the respondent's negligence continuing to the time of the injury would be immaterial. In the second, the rule

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of last clear chance would not apply unless the respondent's negligence had spent itself or culminated in a situation from which the exercise of reasonable care on his part thereafter would not extricate him. The appellant, however, is in no position to complain of this defect. The instruction offered by the appellant, instead of this, reads as follows:

"I instruct you that if you find from the evidence that the driver of defendant's automobile at the time and place of the accident complained of herein, after he saw, or in the exercise of reasonable care, should have seen the plaintiff in a place of danger, used every means at hand to avoid striking the plaintiff, then your verdict must be for the defendant."

It is obvious that this requested instruction was open to the same criticism as the instructions actually given, and to a much greater degree. The first instruction given recites facts which, if found, would show that reasonable observation on the driver's part might have advised him that the respondent was unconscious of his danger, so that the driver would have no right to expect that he would take any steps to extricate himself. At any rate, the appellant having failed to request an instruction correctly stating the doctrine of last clear chance, but having requested one fully as objectionable as that given, cannot avail himself of the error here suggested.

The appellant also objects that the last instruction given by the court, as above quoted, was erroneous in that it assumed that the appellant had no right to drive on the left-hand side of the street. It is true that all of the street is open for use to the entire public, but it is also true that a driver who violates the law of the road or a city ordinance must exercise a higher degree of care than otherwise, and if injury results from his failure to observe the ordinance, that failure will constitute negligence *per se*.

It is insisted that the court failed properly to instruct the jury on the issue of contributory negligence. The court gave the following instruction:

"I instruct you that the plaintiff, while walking on the public streets of the city of Seattle, at the time and place of the accident in question, was required to make reasonable use of his senses in order to avoid impending danger, and if he failed so to do, and was injured by reason of such failure, he is guilty of such negligence as will preclude a recovery by him for the injuries, if any, sustained by him. Such reasonable use of the senses means such use as an ordinarily prudent and careful person would have used under like circumstances and conditions, and so in the case before you, if you find that the plaintiff observed the automobile of the defendant before the collision, or by reasonable use of his senses could have observed the said automobile in time to avoid a collision, then he cannot recover damages from the defendant in this case, and your verdict must be for the defendant. . . . Mr. Kerr: That wouldn't be true if they were exceeding the speed limit. By the Court: That will be taken into consideration, ladies and gentlemen of the jury, with the other instructions, as to whether he was exceeding the speed limit. If he was violating the ordinance that I have given, then the law would conclusively presume that the defendant was guilty of negligence."

It is admitted that the instruction as given, but for the final remark of the court in response to the remark of respondent's counsel, correctly stated the law. In fact, the instruction to that point was given at the appellant's request. It is urged that the additional statement of the court told the jury that if the appellant's driver was exceeding the speed limit, the respondent was excused from the exercise of any care. While the language of the court was unfortunate, we hardly think that, in view of the other instructions it was calculated to mislead. It is clear that the court intended to advise the jury that the instruction as given should be taken into consideration with the other instructions touching the appellant's negligence in violating the speed limit. The court had already instructed the jury as to the reciprocal rights and duties of the respondent and the driver of the automobile. He had advised the jury that the respondent had the right to cross over the street at this intersection

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and that the appellant had the right to operate its automobile in the streets of the city; that the respondent was required to use due care in using the street, and that the appellant's driver was required to so operate his machine as to avoid injury to pedestrians; that it was his duty to sound his horn and slacken his speed at the street crossing, and to keep his automobile under control and at a speed not exceeding eight miles an hour; that if he failed to observe these duties, and, by reason thereof, ran the respondent down, and that the respondent himself was free from contributory negligence as thereafter defined, the respondent could recover. Considered in connection with this instruction to which the court's remark evidently referred, it seems clear that the remark could not have misled the jury or, as counsel contends, cancelled the effect of the instruction defining contributory negligence.

Finally, it is contended that the verdict was so excessive as to show passion and prejudice on the part of the jury. After a careful reading of the testimony of the several physicians who have, from time to time, examined and treated the respondent, we cannot concur in this view. If, as the medical testimony tends to show, the respondent, by reason of his injuries, is now a confirmed epileptic, it is clear that the verdict is not excessive. There can be no question that his skull was fractured and that a piece of it was removed, and that, since that time, he has developed epilepsy. What the final result will be, none of the physicians could say. Upon such a record, we would not be warranted in saying that the court abused its discretion in refusing a new trial on the ground urged.

The judgment is affirmed.

Crow, C. J., Gose, Main, and Chadwick, JJ., concur.

[No. 11090. Department One. September 17, 1914.]

JOHN BERNOT, *Appellant*, v. PETER MORRISON *et al.*,
Respondents.¹

PLEADING—COMPLAINT—DEFINITENESS. In an action to enjoin interference with the bed of a lake, in which the state intervened, claiming ownership, it was proper, on motion therefor, to require the complaint in intervention to be made more specific with reference to the character of the lake, it having failed to allege whether it was navigable or not, even though the state might claim the bed of the lake under either condition, since by failure to allege either condition, there was, in effect, a plea of contradictory facts, violating the code rule that the complaint shall contain a plain and concise statement of facts constituting the cause of action.

WATERS AND WATER COURSES—UNNAVIGABLE LAKES—TITLE TO BEDS. Title to the beds of un navigable lakes is not, and never has been, in the state, in view of the construction, as applied in prior decisions of Rem. & Bal. Code, § 143, declaring the common law to be the rule of decision in the courts of this state, so far as not inconsistent with the constitution and laws thereof and of the United States, and the enabling act, 25 Stat. at L., p. 681, which in specifying the lands which shall pass to the state upon its admission into the Union, not including, expressly or by implication, un navigable lakes, but providing "that the state shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act," the state recognizing the conditions therein by its disclaimer, in Const., art. 26, of all right and title to the unappropriated public lands within the boundaries of the state, upon its admission to the Union.

WATERS AND WATER COURSES—UNNAVIGABLE LAKES—DIVERSION—ACTIONS—RIGHTS OF STATE. Although the state holds no title to the bed of un navigable lakes, it has, by reason of its sovereignty, as between itself and the United States, an interest sufficient to maintain an action against an intruder without title.

NAVIGABLE WATERS—RIPARIAN RIGHTS—GRANTS—CONSTRUCTION. The effect of a grant of land on the title to adjoining submerged lands will be determined by the law of the state in which the land lies, the United States assuming the position of a private owner subject to the general law of the state, so far as its conveyances are concerned.

¹Reported in 143 Pac. 104.

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WATERS AND WATER COURSES—UNNAVIGABLE LAKES—TITLE TO BEDS. The common law (Rem. & Bal. Code, § 143), being the rule of decision in the state as affecting unnavigable waters in streams and lakes, title to the bed of an unnavigable lake is in the patentees of lands bordering thereon, the declaration in Const., art. 21, § 1, that "the use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use," never being intended to destroy riparian rights in unnavigable waters; and Laws 1890, p. 706, relating to appropriation of waters for irrigation, and the act of Congress of March 3, 1877, relating to the reclamation of desert lands and the use of water thereon by prior appropriation, containing nothing therein abrogating the common law rule touching littoral and riparian rights in unnavigable waters.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 28, 1912, in favor of the defendants, upon sustaining demurrers to the complaints, in an action for equitable relief. Affirmed.

W. C. Jones and Wicks, Chamberlain & Quackenbush, for appellant.

Reese H. Voorhees, for respondents.

The Attorney General and R. E. Campbell, Assistant, for intervener.

ELLIS, J.—For a statement of the controversy leading up to this litigation, and the facts as to the character and condition of the lake involved, reference is made to the opinion of this court in *Morrison v. Bernot*, 58 Wash. 302, 108 Pac. 772. After that action was dismissed, the plaintiff brought the present action to enjoin the defendants, littoral proprietors, from interfering with him in the prosecution of his plan for using the bed of the lake as a storage basin for water for irrigating his non-littoral lands. The state of Washington intervened, claiming to own the bed of the lake, and praying that its title be quieted. The court sustained demurrers both to the plaintiff's complaint and the state's complaint in intervention. The plaintiff, and the state as intervener, have appealed. We shall refer to the parties throughout as plaintiff, intervener and defendants. Omit-

ting caption, conclusion and prayer, the plaintiff's complaint alleges:

"(1) That Saltese lake is a natural body of fresh water situate in Spokane county, of about fourteen hundred acres in extent as surveyed and meandered by the government of the United States about the year 1879, when the public lands of the United States, upon which it was situated, were surveyed, and constitutes a natural reservoir for the storage of water for the purpose of irrigation, manufacture or mining, and before such surveys were made, *it had been set apart and appropriated by the government of the United States by an act of Congress of date, March 3, 1877, for such purposes and ever since has been so set aside and dedicated by said act of Congress and by the laws of the territory and state of Washington, to such uses, and has always been open to appropriation by the citizens of the territory and state of Washington for such purposes.*

"(2) That plaintiff is and at all times hereinafter mentioned was, a citizen of the United States, and for more than six years last past has been and now is a resident and citizen of the state of Washington, and for a long time prior to the 17th day of April, 1908, was the owner of the southeast quarter (S.E. $\frac{1}{4}$) of section nineteen (19), township twenty-five (25), range forty-five (45) E.W.M. in the county of Spokane, through which the natural outlet of said Saltese lake runs, as more particularly appears from a plat of said lake, a copy of which is hereto attached and marked 'Exhibit A,' and ever since said date, plaintiff has been and now is the owner of a strip of land one hundred feet wide running through the property above described, which strip of land was reserved by plaintiff for right-of-way for a ditch to convey water from said Saltese lake and its natural outlet onto lands lying below said right of way. That on, to wit, the 19th day of February, 1908, this plaintiff, *pursuant to the laws of the state of Washington, duly appropriated the waters of said lake and stream flowing therefrom to the extent 200 cubic feet of water per second of time, duly appropriated the right to use of said lake as a storage basin for water, to be so used by him for irrigation, and duly caused a good and sufficient notice of said appropriation to be posted as required by law and thereafter to be recorded in*

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the office of the county auditor of Spokane county, as required by law.

"(3) That thereafter, and on to wit the 28th day of March, 1908, in action wherein the above named defendants, together with Agnes Morrison, wife of Peter Morrison, and Fanny C. Pugh, wife of Felix M. Pugh, were plaintiffs, and this plaintiff was defendant, by its order duly made, enjoined and restrained this plaintiff from constructing a dam across said outlet for the purpose of availing himself of the rights acquired by such appropriation, and from proceeding with the work required by law in order to hold and enjoy the rights so acquired.

"(4) That thereafter said court, on the motion and at the instance of said plaintiffs in said cause, two of whom are defendants in this cause, by its order made and entered on the 22d day of May, 1909, dismissed said cause on all things and dissolved said injunction. That on to wit the 15th day of April, 1909, this plaintiff, in pursuance of the statute in said case made and provided, and in compliance with the laws of the state of Washington, relative to the appropriation of water for irrigation and other purposes, proceeded to construct a dam across the outlet of said lake and to fill up the ditch which these defendants and others had unlawfully dug and are unlawfully maintaining; the object, purpose and effect of which ditch is to drain said lake and destroy its value for the purpose of irrigation *and uses for which it has been set aside and dedicated by the act of Congress heretofore referred to, and laws of the territory and state of Washington.*

"(5) That while the plaintiff was so engaged in constructing said dam and carrying out the purpose for which he had appropriated the waters of said stream and lake, these defendants, together with a large number of men, all of whom plaintiff is advised and believes were the agents and servants of said defendants, with force and arms destroyed plaintiff's said dam and all the work he had done in pursuance of law for appropriation of the waters of said lake, and threatened by force to prevent plaintiff from continuing his improvements or the work required by law to preserve his appropriation of water, or to construct said dam or any dam across the outlet of said lake, and prevent him from doing

any act to preserve and protect the rights acquired by him by virtue of such appropriation.

"(6) That the rights acquired by the plaintiff by right of such appropriation are of great value, and when completed, will enable him to carry water upon a very large area, to wit, about one thousand acres of land lying below said dam and ditch, which land is now of little value and when supplied with water from plaintiff's ditch, will be of great value."

The parts italicized were stricken on motion, and a demurrer sustained as to the balance.

The intervenor's second amended complaint in intervention, omitting caption and prayer, is as follows:

"(1) That Saltese lake is a nonnavigable body of fresh water situated in townships 24-25 north, range 45 east of the Willamette Meridian in Spokane county, Washington, and containing about fourteen hundred acres, as surveyed and meandered by the government of the United States during the years 1877-78.

"(2) The state of Washington, the intervenor herein, is the owner and entitled to the possession of the waters and bed of said lake as it existed at the time of the survey thereof, and has been the owner and entitled to the possession of said premises ever since the admission of said state into the Union on November 11, 1889.

"(3) That the plaintiff and defendants herein are wrongfully asserting some right, title and interest in and to the bed of said lake, and are wrongfully withholding the same from the intervenor herein."

The original complaint in intervention contained no allegation as to the character of the lake, whether navigable or unnavigable. On motion to make more specific in that respect, the intervenor elected to plead the actual fact that the lake was not navigable.

The claim that this was the initial error, we shall dispose of at once. It is manifest that, as a matter of fact, the lake was either navigable or not navigable. Even if, as asserted, the intervenor might claim the bed of the lake because of either condition, it could not, at the same time, claim be-

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cause of both. The two conditions could not exist at the same time. Both, therefore, could not be pleaded and asserted as a basis of title at the same time. The truth of one would establish the falsity of the other. To plead both would violate the rule of the code that the complaint shall contain a plain and concise statement of *facts* constituting a cause of action. Pleading contradictory *facts* can hardly be termed a plain and concise statement of any fact, though either fact might support the action. *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 Pac. 331, 48 L. R. A. 177. It is obvious that this is true whether the allegation be express that the lake was both navigable and unnavigable, or inferential to the same effect, or uncertain in failing to allege either. The defendants, therefore, were entitled to a plain and concise statement of the one condition or the other. The case of *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023, chiefly relied upon by intervenor in this connection, is inapposite. There the facts in support of the plaintiff's title as pleaded were three: riparian ownership, appropriation and contract. All were specifically pleaded. All could exist at the same time as actual facts cumulating to the one result—title in the plaintiff. Neither tended to contradict the other. In such a case, it was, of course, error to compel an election. It would be unreasonable to require an abandonment of any facts tending to the same result and wholly consistent with the other facts pleaded.

The one dominant question in this case is this: Who owns the bed of Saltese lake, the state of Washington, the United States, or the proprietors of littoral lands? Our statute, Rem. & Bal. Code, § 143 (P. C. 81 § 1), declares:

"The common law, so far as not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."

This court, early in its history, construed this declaration to mean that, in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but will not blindly follow the decisions of the English courts as to what is the common law without inquiry as to their reasoning and application to circumstances. *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830. Applying this statute so construed, it seems to us that the state's claim of title to the bed of this lake is foreclosed by our own decisions.

In *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107, the contest was between the common law rights of riparian proprietors on an unnavigable stream and right of appropriation by nonriparian owners made subsequent to the occupancy of the riparian lands, with intent by the riparian settlers to acquire title from the government. It was held that common law riparian rights are initiated with such occupancy and prevail over subsequent nonriparian appropriation, notwithstanding the act of 1890 relating to and recognizing the right of appropriation by nonriparian owners for irrigation and mining. Rem. & Bal. Code, § 6325 (P. C. 171 § 227). It was also held that, under the statute making the common law the rule of decision in the courts of this state, Rem. & Bal. Code, § 143 (P. C. 81 § 1), the right of the riparian owner to the natural flow of the stream by or across his land in the accustomed channel, except as diminished by prior appropriations, is an incident to his estate, not as a mere easement, but as a part of the estate. To the same effect, see *Still v. Palouse Irrigation & Power Co.*, 64 Wash. 606, 117 Pac. 466.

In *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 83 Am. St. 821, 54 L. R. A. 178, this court, because of the same statute making the common law the rule of decision, held that the title to the bed of an unnavigable, unmeandered stream is in the adjacent riparian proprietors, as this is not

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inconsistent with either Federal or state constitution or laws, nor incompatible with the institutions and condition of society in this state. The court said:

"The title to the land under all the navigable waters of this state passed from the sovereignty of the United States to the sovereignty of the state upon the admission of the state to the Union; but, under the well established law of the land, the title to the land under the nonnavigable waters passes from the United States to the grantee of the upland bounding on such nonnavigable waters as an incident to such grant; and, although at the common law the test of the navigability is the ebb and flow of the tide, yet, especially in this country, it is held that the rivers and streams above the ebb and flow of the tide, which have sufficient capacity for useful navigation, are public rivers and subject to the same general rights which the public possesses in navigable waters."

See, to the same effect, *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Nesalhouse v. Walker*, 45 Wash. 621, 88 Pac. 1032. Each of these cases involved unnavigable streams. The appellant contends that the rule they announce is merely the common law rule of boundary, and that it would not apply to a shallow, unnavigable lake.

In *Madson v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 5, the main lake, Liberty lake, was navigable. The arm of the lake, which the irrigation company sought to drain and to which the land of the respondents there was littoral, was not navigable. This circumstance, the court, however, held immaterial, deciding the question solely upon the fact that the respondents had acquired vested rights by patent from the United States prior to the adoption of the constitution, while the irrigation act, Laws of 1899, p. 261 (Rem. & Bal. Code, § 6325; P. C. 171 § 227), under which the appellant was organized, provides that the right of a nonriparian owner to take water for irrigation is "subject to rights existing at the time of the adoption of the constitution of this state," citing *New*

Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. Apparently the exact question here involved, namely, who owned the bed of the arm or lagoon, was neither considered nor decided. The language of the decision, in terms probably broader than intended, was to the effect that the owner of land littoral to either a navigable or unnavigable lake, whose title was initiated prior to the adoption of the state constitution, has the right to have his land laved by the water in its natural state, which right cannot be invaded without condemnation and compensation. Since, however, the water there involved was unnavigable, that case as an authority should be confined to unnavigable waters, and is so confined by the recent decisions of this court in *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

In *State ex rel. Liberty Lake Irrigation Co. v. Superior Court*, 47 Wash. 310, 91 Pac. 968, the irrigation company sought to condemn "a right of way for a ditch and the riparian or littoral rights of relators to the waters of a non-navigable arm of Liberty lake." The waters involved were those of the same arm of the lake involved in the *Madson* case. It was urged that the littoral owners, by the act of Congress of March 3, 1877, the desert land act, had no littoral rights because that act antedated their patent from the government. The court refused to construe that act, holding that in any event our statute, Rem. & Bal. Code, § 6382 (P. C. 271 § 279), placed the duty on the state to provide how "the appropriation and use of the public," mentioned in the statute, should be exercised. The court, following and quoting *State ex rel. Kettle Falls etc. Co. v. Superior Court*, 46 Wash. 500, 90 Pac. 650, said:

"Under Bal. Code, § 4156 [Rem. & Bal. Code, § 6382] (P. C. § 5871), the ordinary abutting owner must submit to the condemnation of his riparian rights to the natural flow of the water as at common law, with the limitation, however,

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that water 'that is used by said person himself for irrigation, or that is needed for that purpose by any such person' may not be condemned."

concluding:

"We think it comports with the general policy of the state to hold that this statute contemplated the use by the abutting owner of the water necessary for his present needs and for those that accrue as he in good faith proceeds with reasonable dispatch to construct the means for applying the water to his adjacent arid land."

It was held that the order of appropriation by the condemning company should except sufficient water to meet those purposes.

In *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515, the same unnavigable arm of Liberty lake was involved. The facts are fully stated in the opinion. It appears that the arm of the lake was, at low water, dry at its intake, so that it formed at such times a separate, unnavigable lake. The water company and its predecessors in interest had constructed a dam at this intake, and a canal and laterals for the purpose of carrying water for irrigating nonlittoral land. The main canal was cut through what was formerly the bed of the arm, thus draining it. The water company brought the action, to condemn a strip of land $37\frac{1}{2}$ feet wide on either side of the center of this canal, and to condemn whatever littoral or riparian rights the littoral owners had. The trial court enjoined interference with the natural level of the waters of the lagoon, and ordered the removal of the dam and head gates. This court, though again refusing to pass upon the desert land act of March 3, 1877, reversed the lower court on the ground that, though the statute, Rem. & Bal. Code, § 6382, *supra*, inhibits condemnation of rights of riparian or littoral owners to water needed for irrigation, it establishes the policy of this state for a joint user where riparian rights are sought to be taken by condemnation.

In *State ex rel. Ham, Yearsley & Ryrie v. Superior Court, supra*, we held that a riparian upland owner of land bordering a navigable lake has no common law riparian or littoral rights as against the state or one who appropriates water in pursuance of the law of the state, for the reason that by § 1 of art. 17 of the state constitution, the state has asserted ownership in the beds and shores of such navigable waters; this regardless of the fact that the title of the littoral owners was initiated prior to the adoption of the state constitution. In that case, it was also held that the statute, Rem. & Bal. Code, §§ 6325, 6326, 6338 (P. C. 171 §§ 227, 229; 271 § 185), was not intended to give to the bordering upland owner any preference or different right to take water from navigable streams or lakes from those accorded to other persons by appropriation. As among all members of the public, the right to use such waters is determined solely by priority of appropriation. Since this case was rested squarely upon the state's ownership of the beds and shores of navigable lakes, and is distinguished from the *Madson* case, *supra*, solely on that ground, it follows that this case, with the *Madson* case, and, we may add, with the other Liberty lake lagoon cases, necessarily implies that the ownership of the beds of unnavigable lakes is not in the state. None of these decisions expressly marks a difference either in the riparian rights on unnavigable streams and unnavigable lakes, or in the rule of ownership of the beds of unnavigable streams and unnavigable lakes. They simply leave that question untouched except by inference. It is true, in the two later Liberty lake lagoon cases, the condemnation sought was apparently not only for water rights, but also for a right of way across the drained bed of the lagoon. The ownership of this bed by the littoral proprietors seems to have been conceded by the parties and to have been unquestioned by the court. At any rate, in neither of these cases, did the court decide this question. The ownership of unnavigable, meandered lakes still remains an open question

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in this state and is undecided further than, as we have seen, the reasoning in the *Ham, Yearsley & Ryrie* case, and the conclusion there reached necessarily eliminates all ownership in the state. In all of the other cases above referred to, the contests were between rival claimants of water; not, as here, between claimants of the land and a claimant of the water. The title to the land or bed of the lake as an element in the controversy seems to have been either conceded as in the littoral owners or overlooked.

The intervener asserts the broad proposition that a sovereign state, by virtue of its sovereignty, is the owner of everything within its borders which it has not expressly granted or waived its title to. It is argued that the title to the water and bed of the lake, being in the United States prior to the admission of the state into the Union, and not having been reserved by the United States nor relinquished to the United States by the state upon its admission, the title must be in the state. This argument is unsound for two reasons. In the first place, it proves too much. It would place the title to the beds and waters of unnavigable streams, as well as of unnavigable lakes, in the state. But, as we have seen, this court has steadily adhered to the view that, in the absence of reservation, a United States patent of land riparian to an unnavigable stream carries title to the center of the stream. *Benton v. Johncox*, *Griffith v. Holman*, and *Watkins v. Dorris*, *supra*. The claim that this is but a doctrine of "boundary" makes no difference on the question of original title as between the state and the United States, since a mere rule of boundary could not divest the state's title if it had one, nor operate as a relinquishment of title by the state except in a patent issuing from the state. *Hardin v. Shedd*, 190 U. S. 508. It seems more consonant with reason to say that the beds of unnavigable streams and lakes on public lands were a part of the public domain of the United States and, as such, disclaimed, like other unappropriated public lands within its borders, by the state on its admission to the Union.

State Constitution, article 26. In the second place, the United States did reserve to itself the beds of unnavigable streams and lakes in the Congressional act of February 22, 1889, known as the "Enabling Act." 25 U. S. Stat. at L., p. 681, pursuant to which this state came into the Union. That act, in § 17, specifies the lands which shall pass to the state of Washington upon its admission into the Union. It does not include, either expressly or by any shadow of implication, nor even refer to, unnavigable lakes. It does, however, expressly exclude all swamp and overflow lands. It concludes with the provision expressly excluding everything not specifically included, as follows:

"That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act." 25 U. S. Stat. at L., p. 681.

The state's disclaimer, in article 26 of its constitution, was merely a recognition or acceptance of this condition of the enabling act. The observation of this court relative to the disclaimer of patented tide, swamp and overflow lands, found in § 2 of art. 17 of the state constitution, applies with equal force to the disclaimer found in art. 26. It "disclaims all title." "The state merely asserts nothing." *Baer v. Moran Bros. Co.*, 2 Wash. 608, 615, 27 Pac. 470. Every consideration induces the conclusion that the state does not own, and never owned, the bed of Saltese lake.

But it does not follow that, because the state does not own the land included within the meander lines of this unnavigable lake, it cannot object to the draining of the lake by an intruder. If the bed of the lake is owned by the littoral proprietors, they may drain it if they please, so long as unappropriated by a prior appropriation and uncondemned. They would merely be reclaiming their own land. If, however, it still belongs to the United States, the state of Washington has, by virtue of its sovereignty, an interest suf-

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ficient to warrant its maintaining an action against an intruder without title.

"It is enough to say that by virtue of its sovereignty the state of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the state owns the bed or not. This principle has been affirmed and acted on by the court so recently that it does not require further argument here. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Hudson Water Co. v. McCarter*, 209 U. S. 349, 356. See, also, *Kansas v. Colorado*, 206 U. S. 46, 93; *McGillvra v. Ross*, 215 U. S. 70, 79." *Marshall Dental Manufacturing Co. v. State of Iowa*, 226 U. S. 460, 462.

Though the state does not own the bed of the lake, we must still address ourselves to the question, who, as between the United States and its patentees of the bordering lands, does own it? It is not alleged, either in the plaintiff's complaint or in the complaint of the state in intervention, that the defendants own the lands bordering the lake under patents from the United States, but the entire argument on both sides proceeds upon the assumption that they do. We shall also proceed upon the same assumption. It is alleged, and the demurrers admit it, that the lake was surveyed and measured by the United States government during the years 1877 and 1878. The law is well settled that grants of the government of the United States of lands bordering on streams and other waters, without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie. *Hardin v. Jordan*, 140 U. S. 371. More specifically stating the same rule as applied to both unnavigable and navigable waters, the supreme court of the United States has said:

"When land is conveyed by the United States bounded on a nonnavigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case, the land under the water does not belong to the United States, but has passed to the state by its admis-

sion to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. In the case of land bounded on a nonnavigable lake, the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned. *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1, 45; *Grand Rapids & Indiana R. R. Co. v. Butler*, 159 U. S. 87, 90, 93; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 363. (Such cases are not affected by Rev. Stat. §§ 2476, 5251.) When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore. The rule as to conveyances bounded on nonnavigable lakes does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point." *Hardin v. Shedd*, 190 U. S. 508, 519.

It is clear, therefore, that the effect of the patents from the United States to the littoral proprietors of the land bordering this lake, i. e., whether they carry title to any part of the bed of the lake, is one for our determination, which determination the supreme Federal court has announced it will follow. It is equally clear, from its own decisions, that the rulings of the United States supreme court, much less of the department of the interior, however persuasive, are of no binding force upon this court touching the question here involved. Even where it has once declared the effect of a grant, and subsequent decisions of the state courts declare the effect differently, the supreme court will change its ruling and follow the rule of the state court as to the effect of

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grants within the state's borders. *Hardin v. Jordan* and *Hardin v. Shedd*, *supra*. In the first of these cases, the supreme court, assuming that the rule of the common law was the law of Illinois, held that the littoral proprietor, by his grant from the United States, took to the center of the lake. In the second, following subsequent decisions of the supreme court of Illinois to the effect that the grant extended only to the water line, the supreme court of the United States reversed its former decision in that respect. It must be noted, however, that the later decision in *Hardin v. Shedd* does not overrule or modify the decision in *Hardin v. Jordan* as to what is the rule at common law. There being no direct statutory or constitutional declaration touching the extent of a grant bordering unnavigable water, we must resort to the rule of the common law and apply it to this question, as we have done to grants bordering unnavigable streams, so far as compatible with our institutions and the needs of our people (Rem. & Bal. Code, § 143; P. C. 81 § 1); and so far as uncontrolled by our own decisions. The rule of the common law as authoritatively declared in England is found in *Bristow v. Cormican*, 3 App. Cas. 641. The lake there in question was Lough Neagh, in the north of Ireland, from fourteen to sixteen miles long, and six to eight miles wide, the longest inland lake in the United Kingdom, and navigable in fact. The concrete question involved the right of fishing in the lake under grant from the crown. The determinative question was whether this lake was the property of the crown or of the littoral proprietors. Lord Blackburn states the gist of the decision as follows:

"The property in the soil of the sea and of estuaries and of rivers in which the tide ebbs and flows is *prima facie* of common right vested in the Crown, but the property of dry land is not of common right in the Crown. It is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of author-

ity to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake . . . It is, however, necessary to decide whether the Crown has of common right a *prima facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it." *Bristow v. Cormican*, 3 App. Cas. 641, 665-667.

It seems clear that the proprietorship of the sovereign is there determined by a conventional navigability going with the ebb and flow of the tide, not by the fact of actual navigability. The supreme court of the United States, in *Hardin v. Jordan*, *supra*, after quoting the above language from *Bristow v. Cormican*, cites and quotes from many American decisions, notably *Smith v. Rochester*, 92 N. Y. 463, and *Cobb v. Davenport*, 32 N. J. L. 369, from the latter adopting the following:

"By the common law, all waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter in the individual proprietor. The title of the sovereign being in trust for the benefit of the public—the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him, is exclusive—subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact . . . And all the cases in which waters above the ebb and flow of the tide, such as great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law."

The court adds:

"But we forbear to quote further the reasonings of the cases. There are many more to the same effect, all going to demonstrate what the rule of the common law is with regard to the ownership of the beds of inland lakes, not of such size or importance as to be classed with the great inland navigable lakes and rivers of the country. We need not depend upon the English case of *Bristow v. Cormican* alone, great

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as its authority necessarily is; but are surrounded by a cloud of witnesses in our own country whose testimony is in harmony with that decision."

This goes much farther than necessary to go to establish a private ownership in the bed of the lake here in question, and much farther than the enabling act, our constitution and our decision in the *Ham, Yearsley & Ryrie* case would permit us to go. Moses lake, involved in that case, is a small lake, but actually navigable. It is not an open question in this state that actual navigability is determinative of the ownership in the state of the shores and beds of rivers and lakes. The decision in *Hardin v. Jordan*, *supra*, however, does emphasize the fact that if we follow the common law as declared by the supreme court of the United States so far as we may without conflict with our constitution and our own decisions, we must hold that littoral proprietors on unnavigable lakes in this state take title to the bed to the center of the lake. The rule laid down in *Hardin v. Jordan* has been followed by the department of the interior and by many courts with regard to the passing of the beds of unnavigable lakes by force of the grant of the littoral lands. *F. M. Pugh et al.*, 14 Land Decisions, 274; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, 60 N. W. 681, 47 Am. St. 516, 25 L. R. A. 815; *Rice v. Ruddiman*, 10 Mich. 125; *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. 865, 30 Am. St. 669, 18 L. R. A. 695; *Lamprey v. Minnesota*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. 541, 18 L. R. A. 670; *Poynter v. Chipman*, 8 Utah 442, 32 Pac. 690; *Olson v. Huntamer*, 6 S. D. 364, 61 N. W. 479; *Scheifert v. Briegel*, 90 Minn. 125, 96 N. W. 44, 125 Am. St. 135, 63 L. R. A. 296; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. 828, 8 L. R. A. 578; *Ridgway v. Ludlow*, 58 Ind. 248. The just and equitable result of the rule, as it seems to us, is clearly stated by the supreme court of the United States in *Mitchell v. Smale*, 140 U. S. 407, 412, 413, as follows:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment, and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

It will be noted that in all of the cases, the fact that an unnavigable lake or pond has been meandered by the government is held immaterial, since this is merely for the purpose of determining the quantity of land for which the purchaser must pay, and not for the purpose of limiting to the meander line the title of the grantee from the United States. It is true that many other American authorities hold that the rule that a grantee of land bordering an unnavigable stream carries title to the thread of the stream does not apply to grants of lands bordering upon lakes and ponds, and that in such cases the title extends only to the water line, applying the same rule of boundary to navigable and unnavigable lakes. *Fuller v. Shedd*, 161 Ill. 462, 44 N. E. 286, 52 Am. St. 380, 33 L. R. A. 146; *Trustees v. Schroll*, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575; *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Boorman v. Sunnuchs*, 42 Wis. 233; *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Noyes v. Collins*, 92 Iowa 566, 61 N. W. 250, 54 Am. St. 571, 26 L. R. A. 609; *Carr v. Moore*, 119 Iowa 152, 93 N. W. 52, 97 Am. St. 292; *Fletcher v. Phelps*, 28 Vt. 257; *Kanouse v. Slockbower*, 48 N. J. Eq. 42, 21 Atl. 197; *Indiana v. Milk*, 11 Fed. 389. The decisions of the courts of Massachusetts, Maine and New Hampshire, to the effect that the title of a littoral proprie-

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tor on a lake or pond extends only to the water's edge, we regard as negligible. The Massachusetts doctrine rests upon ordinances adopted by the Colony of Massachusetts in 1641 and 1647. *Paine v. Woods*, 108 Mass. 160; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466. The other two states were originally parts of that colony and seem to have followed the Massachusetts decisions.

In *Indiana v. Milk*, which is probably the most persuasive of the cases holding contrary to the views here expressed, the court uses the following language:

"Nonnavigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles without interference or confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when this rule is attempted to be applied to lakes and ponds, practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds. Beaver lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural nonnavigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim."

The supreme court of the United States in *Hardin v. Jordan*, *supra*, quotes and fully answers this argument as follows:

"We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases (which may be left for determination when they arise) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the land under water in front of him; and as between them, we think there is no question as to the riparian owner's right."

We hold that the common law, as declared by the supreme court of the United States, so far as all unnavigable waters, whether in streams or lakes, are concerned, that is to say, waters not actually navigable, is the common law and rule of decision in this state. We know of nothing in the character of our institutions or in the state of our society militating against its application to all such waters. The declaration in our constitution, § 1 of article 21, that:

"The use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use" was never intended to destroy riparian rights in unnavigable waters. If it were, it would as effectually destroy those rights in unnavigable streams as in unnavigable lakes. It

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marks no distinction between the two. Yet, as we have seen, this court has repeatedly declared that the title of the riparian owner on an unnavigable stream extends to the center of the stream. This section of the constitution was merely intended to remove any doubt as to the power of the legislature to authorize the taking of such riparian property rights for the purpose mentioned through the exercise of the power of eminent domain. Nor do we find anything in the act of 1890 (Laws 1890, p. 706 *et seq.*) not in consonance with this view. On the contrary, as pointed out in *Benton v. Johncox, supra*, the legislature in that act recognized such riparian rights. It is there said:

"Nor did the legislature disregard the rights of riparian owners in the general act of 1890, relating to appropriation of water for irrigation. 1 Hill's Code, § 1718 *et seq.* On the contrary, §§ 1761 and 1774 of that act especially recognize the existence of riparian rights, and we do not see anything in that statute, or the subsequent act of 1891 (Laws 1891, p. 327) evincing an intention on the part of the legislature to disregard such rights."

And again, in all of the Liberty lake lagoon cases above referred to, littoral rights, in the waters, at least of unnavigable lakes, are recognized, and it is, in effect, held that they are preserved to the extent needed for irrigation of the littoral lands, even against condemnation, by § 57 of the act of 1890 (Rem. & Bal. Code, § 6382; P. C. 271 § 279).

Nor do we find anything in the Federal act of March 3, 1877, when limited to what we conceive to be its only purpose, abrogating the common law rule touching riparian and littoral rights in unnavigable waters, though the Oregon cases mainly relied upon by the state, *Williams v. Altnow*, 51 Ore. 275, 95 Pac. 200, 97 Pac. 539; and *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, present a very strong argument that the act should be so construed. These cases were cited and considered by this court in *Still v. Palouse Irrigation & Power Co.*, 64 Wash. 606, 117 Pac. 466. We then declined to follow them, saying:

"The act itself manifestly relates only to the reclamation of desert lands and confines the use of the water to the amount 'actually appropriated and necessarily used for the purpose of irrigation and reclamation'; such right to be determined by *bona fide* prior appropriation. As to such lands, Congress recognized and assented to the appropriation of water in contravention of the common law right of the lower riparian owner to insist on the continuous flow of the stream. This court has always recognized the doctrine of prior appropriation of water on public lands as superior to all other claims, while it has also recognized the common law right of the riparian owner against all but *bona fide* prior appropriators."

On careful reconsideration, we decline to modify that holding. The trial court committed no error in striking from the complaint of the plaintiff the allegations relative to this act.

This case has given us much difficulty. We are satisfied, however, that it must be soundly held that, under the allegations of the complaint and complaint in intervention, title to the bed of this unnavigable lake vested in the patentees of the bordering lands, and that neither the state nor the United States now has any title thereto. It follows that the court committed no error in sustaining the demurrers to the complaint and the complaint in intervention.

Of course, we do not decide what would be the result should it transpire as an actual fact that the land included within the meander lines of Saltese lake are not, and never were, in fact, the bed of a lake. That question is not before us. It was presented touching this very land in *Gauthier v. Morrison*, 62 Wash. 572, 114 Pac. 501. The complaint in that case alleged, in substance, that the land included within the meander lines of this lake was wrongfully, erroneously, and fraudulently designated as a lake. A demurrer was sustained to the complaint, and the decision was affirmed by this court. On writ of error, the supreme court of the United States reversed this court, holding that the complaint stated a cause

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of action, and remanded the cause for trial. In the case before us, no such facts appear; no such allegation is made either in the complaint or in the complaint in intervention.

The judgment is affirmed.

Crow, C. J., Gose, Main, and Chadwick, JJ., concur.

[No. 11418. Department Two. September 17, 1914.]

RICHARD H. LORD, *Respondent*, v. WAPATO IRRIGATION
COMPANY *et al.*, *Appellants*.¹

BROKERS — EMPLOYMENT — CONTRACT — TERMINATION. A contract employing brokers to purchase certain Indian allotments for an irrigation company is not terminated by the individual acts of representatives of the company, where the brokers did not consent to termination, nor waive any rights they might have under the contract.

ASSIGNMENTS — CONTRACT OF EMPLOYMENT — ABROGATION. Where a contract employing brokers to purchase Indian allotments for a corporation provided for stated commissions in case certain of the allotments were secured within a limited time through sources other than the efforts of the brokers, thereby recognizing possible failure as the result of their efforts, an assignment by one broker of his interests in the contract to the other, does not operate as an abrogation of the contract and bar recovery of commissions earned, it being conceded that the brokers acted in good faith and made honest effort to secure the allotments; since, although contracts calling for professional services requiring special qualifications are not assignable, the broker could assign his interests in the contract in so far as they were earned.

BROKERS — CONTRACT OF EMPLOYMENT — COMMISSIONS — RIGHT TO RECOVER — CONSTRUCTION. A clause in a contract limiting the price brokers were authorized to pay for certain Indian allotments, does not defeat the right to recover commissions under another clause of the contract providing therefor in case the allotments were secured within a limited time through sources other than the efforts of the brokers, resulting in larger commissions than if the brokers had been successful, the provisions being in no way dependent, and it being evident that the brokers desired compensation for their services whether successful or not, which the contract allowed sub-

¹Reported in 142 Pac. 1172.

ject to the limitation imposed, it being conceded that the brokers acted in good faith and made diligent effort to obtain the property according to the terms of the agreement.

BROKERS—CONTRACT OF EMPLOYMENT—COMPENSATION—TIME FOR PERFORMANCE—LIMITATION. Where a contract employing brokers to procure certain Indian allotments provided that, when consents to the sale of five of the allotments were obtained and delivered to a corporation, it would pay to the brokers the compensation agreed upon therefor, and provided in another paragraph of the contract that in case the corporation secured title to three other allotments through any source whatever within one year from the receipt of deeds to the lands purchased under the first five allotments, the brokers would receive \$3,000 and a commission of seven and one-half per cent, as though such consents and deeds had been secured through their efforts, the limitation respecting the time for acquiring title to the three allotments began to run from the date of the final deeds to the five allotments, and not from the time consents were obtained and delivered to the company.

SAME—TERMINATION OF CONTRACT—CONSTRUCTION. In such a case, the fact that the corporation did not delay purchasing the three allotments beyond the time agreed upon, thereby defeating the brokers' claim for commissions, would not indicate that the contract had been terminated, since the corporation was bound to exercise good faith in performing the conditions imposed by the contract.

BROKERS—EMPLOYMENT—SALES BY OWNER—COMMISSIONS—VESTED INTEREST. A broker is not entitled to recover commissions on a sale of property by the owners thereof, on the ground that he had a vested interest in the property created by a contract employing him to obtain consent to purchase certain Indian allotments, and to subsequently act as sales agent, the contract with reference to the appointment of selling agents providing that if the broker acted promptly and faithfully, and the purchaser should put the property on the market for sale, it would appoint the broker its sole agent and pay commissions on sales made, since the agreement was a contingent promise or option and inconsistent with the idea of a vested interest.

ASSIGNMENTS—JOINT CONTRACT WITH BROKERS—COMMISSIONS—TENDER OF PERFORMANCE. A contract employing brokers to secure Indian allotments for a corporation, which provided that if the brokers acted promptly and faithfully and the purchaser should put the land on the market for sale, it would appoint them sole agents and pay commissions on sales made, implies the rendition of services, or tender of services, by both brokers, and a tender of performance by one broker, after assignment to him of the other's interest in the contract, does not entitle the assignee to a recovery of com-

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missions, since the contract involved services requiring special qualifications, and was not assignable without consent of the employer.

SAME—CONSENT TO ASSIGNMENT—RATIFICATION—EVIDENCE—SUFFICIENCY. In such a case, the evidence is insufficient to sustain a finding that the corporation consented to and ratified the assignment of the broker's interest in the contract to his co-employee and substituted the assignee as sales agent under the contract, where it appears that, dissatisfaction having arisen between the brokers, a consultation was had between the assignee, a director of the corporation and a third person relative to purchasing the assignor's interests, and an agreement had to that effect, whereupon the assignee purchased the interests with his own funds, the corporation not being a party to the agreement, and the majority of the directors thereafter refusing to consent thereto, that letters from the president of the corporation, while showing a desire to have the assignee's services as selling agent and a willingness to pay him the regular commission on sales made, were general in their statements and were such as would be sent to any agent, and that a conversation between the assignee and a director of the corporation was insufficient to justify the conclusion that the corporation ratified the assignment or substituted the assignee as sales agent.

PLEADING—ANSWER—INCONSISTENT DEFENSES—ESTOPPEL. Where an answer in an action on a broker's contract of employment, admitted an assignment by one broker of his interests under the contract to the other broker, but denied approval and ratification as alleged in the complaint, and as separate defenses, alleged abrogation of the contract and a full settlement of differences thereunder, and a breach of the contract and a demand for damages, the plea of settlement and demand for damages are not inconsistent defenses, since neither is necessarily false, and hence do not estop the defendant to deny approval and ratification of the assignment.

BROKERS—CONTRACT OF EMPLOYMENT—CONSTRUCTION. A contract employing brokers to procure consents to purchase certain Indian allotments is not absolute in providing that the brokers will procure one-third of the acreage in three of the allotments desired, thereby rendering them liable in damages for a breach thereof, but is an employment of the brokers to negotiate for the purchase of the lands, a performance on their part being an endeavor in good faith to procure the property; especially where the contract provided for the payment of commissions though the property be secured through sources other than the efforts of the brokers.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 26, 1913, upon findings

in favor of the plaintiff, in an action for an accounting, tried to the court. Reversed.

Donworth & Todd and Reeves, Crollard & Reeves (Francis H. Brownell, of counsel), for appellants.

Dorr & Hadley and T. E. Cade, for respondent.

FULLERTON, J.—This is an appeal from a judgment for the sum of \$52,336.75, rendered by the superior court of Chelan county in favor of the respondent against the appellants, in an action for an accounting.

A somewhat extended statement of the facts is necessary to an understanding of the controversy. Prior to the year 1909, the appellant Wapato Irrigation Company was organized as a corporation under the laws of the state of Washington, for the purpose of engaging in a land and irrigation project in Chelan county. A large part of the lands it desired for its purposes were owned by Indians under allotments made to them pursuant to a statute of the United States enacted to carry into effect an agreement with them known as the Moses agreement. Under this statute, certain parts of these lands were alienable by the allottees under rules and regulations prescribed by the secretary of the interior department of the United States. The regulations in force in the early part of the year 1909 required a contemplating purchaser of such land to procure from the Indian allottee a written consent to a sale to the purchaser, whereupon, if the terms agreed upon therein were approved by the secretary, conveyances were made directly to the purchaser by the government on the payment of the agreed purchase price. The irrigation company, prior to the year named, had been unable to procure such consents, and was then desirous of engaging the services of some suitable and competent person to procure them for it. The land desired, when irrigated, was adapted to orchard growing, and it was the scheme of the irrigating company, should it obtain title

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thereto, to provide for its irrigation, divide it into tracts of suitable acreage, and sell it as orchard lands.

In the early part of the year 1909, Lord and Brown were partners as real estate brokers, having an office at the city of Chelan, near the lands the irrigation company desired to purchase. Lord was well acquainted with the different Indian allottees, and could converse with them in a dialect which they well understood. He also had a thorough knowledge of the character of the Indians, their method of thought and manner of doing business, and was otherwise well qualified to deal with them. Brown was an experienced real estate broker, and had had large experience in the sale of orchard lands. Lord and Brown also owned a tract of land adjacent to the allotted lands, which they were desirous of selling. In March, 1909, the irrigation company sought to employ Lord to procure for them the consent of the Indians to sell so much of their lands as they were willing to and could lawfully alienate. Lord insisted that Brown be included in any agreement made with reference to the transaction, and after mutual negotiations, an agreement was entered into between Lord and Brown on the one part, and the irrigation company on the other. As this agreement is the basis of the present action, we set forth the same at length, omitting only the exhibit attached thereto and referred to therein; the exhibit being merely a description by metes and bounds of the different allotments sought to be purchased. It will be remembered, however, that the numbers placed before the different paragraphs do not appear in the original. They were inserted by counsel for convenience of reference, and we have included them for the same purpose. It may be well, also, to remark here that the appellant Chelan Land Company acquired an interest in the property subsequent to the execution of the agreement, and concedes itself liable to answer jointly with its co-appellant for any liability arising out of the agreement. The agreement follows:

"(1) This agreement, made and entered into this 27th day of March, A. D., 1909, by and between Richard H. Lord and Chas. F. Brown, parties of the first part, and the Wapato Irrigation Company, a corporation existing under and by virtue of the laws of the state of Washington, party of the second part,

"(2) Witnesseth: That whereas the party of the second part is anxious to buy as much as the United States will allow to be sold of the lands situate in Chelan County, State of Washington, and now contained in certain Indian allotments, more particularly described and set forth in Exhibit A, hereto attached and hereby made a part hereof.

"(3) And Whereas, the parties of the first part own in fee simple and hold under contract, certain lands adjoining the above mentioned Indian allotments, which they are anxious to sell.

"(4) And Whereas, The party of the second part believes it to be to its best interest to employ an agent or agents to negotiate the purchase of the above mentioned Indian lands.

"(5) And Whereas, The parties of the first part are well acquainted with the Indian allottees and heirs, and certain of their number can converse readily in the Indian tongue, and they are otherwise fitted, through many years of experience in the buying and selling of Chelan county lands, to act as agents in such a purchase.

"(6) Now, Therefore: The parties hereto agree together as follows: Upon the fulfillment of certain conditions hereinafter set forth, the parties of the first part agree to act as agents of the party of the second part in the purchase of the above mentioned Indian lands as hereinafter more particularly described, and for the prices hereinafter mentioned, and upon the terms and conditions hereinafter prescribed.

"(7) And the parties of the first part, for the considerations and percentages hereinafter set out, will act in good faith as agents for the said party of the second part in the purchase, as hereinafter outlined, of the above mentioned allotments, or as much as the allottees can be persuaded to sell, and until this agreement shall have been abrogated by mutual consent of both parties, the parties of the first part agree individually and collectively not to now or at any future

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time bargain for nor purchase any portion of the above mentioned allotments as such, neither for themselves, nor for any other party whomsoever, other than for the Wapato Irrigation Company or its assigns; but they agree and promise to at all times assist and co-operate in all ways with the party of the second part to the end that it shall obtain title to as much as possible of said allotments as easily, as expeditiously and economically as possible, and to this end and for this purpose they agree that they will at once procure at their own cost and expense the written consent of the following named Indians to the sale of the land allotments held by them under Moses Agreement upon the terms and for the amounts as follows:

"(8) Allotment number nine (9) in favor of Ustah, commonly known as Louis, a more specific description of which is found in Exhibit A hereto attached and made a part hereof, except that said Ustah is to keep and retain for his own use and benefit a certain tract or parcel of said allotment number nine (9) which shall not exceed one hundred (100) acres in extent, for the sum of Twelve Thousand Dollars (\$12,000).

"(9) Allotment number eleven (11) in favor of Tan-te-ak-o, commonly known as Johnny Abraham, a more specific description of which is found in Exhibit A hereto attached and made a part hereof, except that said Tan-te-ak-o is to keep and retain for his own use and benefit a certain part or parcel of said allotment number eleven (11) which shall not exceed one hundred (100) acres in extent, for the sum of Twelve Thousand Dollars (\$12,000). It is agreed, however, that should said Tan-te-ak-o or Johnny Abraham keep and retain for his own use and benefit more than eighty acres of said allotment, then he is to receive a price which shall be less than said Twelve Thousand Dollars (\$12,000) in proportion to the price per acre on the extra acreage retained by the said allottee.

"(10) Allotment number thirteen (13) in favor of Ta-we-na-po, or Amena, a more specific description of which is found in Exhibit A, hereto attached, and made a part hereof, except that the allottee or his successors shall keep and retain for his or their own use and benefit a certain part or parcel of said allotment number thirteen (13), which shall not exceed one hundred (100) acres in extent, for the sum

of Six Thousand Dollars (\$6,000). It is agreed, however, that should the said Ta-we-na-po or Amena or his successors, keep and retain for his or their own use and benefit more than eighty acres out of said allotment, then he or they are to receive a price which shall be less than Six Thousand Dollars (\$6,000) in proportion to the price per acre on the extra acreage retained by the said allottee.

“(11) Allotment number fifteen (15) in favor of Yo-ke-sil, a more specific description of which is found in Exhibit A hereto attached and made a part hereof, except that the said Yo-ke-sil is to keep and retain for her own use and benefit a certain part or parcel of said allotment number fifteen (15) which shall not exceed one hundred (100) acres in extent, for the sum of Eight Thousand Dollars (\$8,000), it being understood and agreed that the hundred acres more or less commonly known as Willow Point shall not be retained by said allottee, and it being further understood and agreed that should said Yo-ke-sil keep and retain for her own use and benefit more than eighty acres out of said allotment, then she is to receive a price which shall be less than said Eight Thousand Dollars (\$8,000) in proportion to the price per acre on the extra acreage retained by the said allottee.

“(12) The south half of allotment number fourteen (14) in favor of Pa-a-na-wa or Pedoi, a more specific description of which is found in Exhibit A hereto attached and made a part hereof, except that the said allottee or his successors shall keep and retain for his or their own use and benefit a certain part or parcel of said allotment number fourteen (14) which shall not exceed fifty (50) acres in extent, for the sum of Four Thousand Dollars (\$4,000). It is agreed, however, that should the said Pa-a-na-wa or Pedoi or his successors keep and retain for his or their own use and benefit more than eighty acres out of said allotment, then he or they are to receive a price which shall be less than Four Thousand Dollars (\$4,000) in proportion to the price per acre on the extra acreage retained by the said allottee.

“(13) The north half of allotment number fourteen (14) in favor of Pa-a-na-wa or Pedoi, a more specific description of which is found in Exhibit A hereto attached, and made a part hereof, except that the said allottee or his successors shall keep and retain for his or their own use and benefit a certain part or parcel of said allotment number fourteen

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(14), which shall not exceed fifty (50) acres in extent for the sum of Four Thousand Dollars (\$4,000). It is agreed, however, that should said Pa-a-na-wa or Pedoi, or his successors keep and retain for his or their own use and benefit more than eighty acres out of said allotment, then he or they are to receive a price which shall be less than Four Thousand Dollars (\$4,000) in proportion to the price per acre on the extra acreage retained by the said allottee.

"(14) The terms and conditions of said written consent in the case of each of said allotments shall be such as shall be approved by the Secretary of the Interior, one provision of which shall be for the furnishing of one and one-half ($1\frac{1}{2}$) acre feet of water per acre per season to each of the Indian allottees for the irrigation of the land retained by him or her out of said allotments, not to exceed eighty acres to any one allotment, One Thousand Dollars (\$1,000), to be paid by said Wapato Irrigation Company upon the execution of this agreement, said One Thousand Dollars (\$1,000) being advanced as expense money to be accounted for as is hereinafter provided, and when said consents shall have been procured and delivered to the said Wapato Irrigation Company, then the said Wapato Irrigation Company shall pay to the said Richard H. Lord and Chas. F. Brown the sum of Twenty-Five Hundred Dollars (\$2,500) in cash as full and complete settlement and compensation for said services. And it is further understood and agreed that the Wapato Irrigation Company reserves to itself the right to decline to purchase any one or all of the allotments hereinbefore described and mentioned after said consents have been procured. But in case the said Wapato Irrigation Company shall decline to purchase said allotments said company shall forfeit to said Charles F. Brown and Richard H. Lord the said sum of One Thousand Dollars advanced as aforesaid for expense money.

"(15) In the event the said Wapato Irrigation Company shall purchase said land, or any part thereof, under the consents so procured, the deeds to same to bear the approval of the Secretary of the Interior, then, upon the conveyance to it of the following described land, free and clear of all incumbrances, the title thereof to be a marketable title, and so shown by an abstract to be furnished therewith, to-wit: The northeast quarter of northeast quarter ($NE\frac{1}{4}$ of $NE\frac{1}{4}$) and lots four (4) and five (5) in section twenty-three (23)

and the southwest quarter of the northwest quarter (SW $\frac{1}{4}$ of NW $\frac{1}{4}$) section twenty-four (24) all in township twenty-eight (28) North Range twenty-one (21) East of the Willamette Meridian; and lots one (1) and two (2) in section twenty-three (23) township twenty-eight (28) North of Range twenty-one (21) East of the Willamette Meridian, all of the above land in Chelan county, Washington. And also upon the assignment to-wit, of that certain contract for the sale and purchase of lots six (6) and seven (7) in section twenty-three (23), the west half of the southwest quarter (W $\frac{1}{2}$ of SW $\frac{1}{4}$) of section twenty-four (24) and lot one (1) of section twenty-six (26) all in township twenty-eight (28) North of range twenty-one (21) East of the Willamette Meridian in Chelan county, State of Washington, holden by Chas. F. Brown of one Walter N. Caswell and wife, executed on the nineteenth (19) day of January, 1909, said Wapato Irrigation Company will pay to the said Chas. F. Brown and Richard H. Lord the sum of Twelve Thousand Dollars (\$12,000) in cash, less the One Thousand Dollars (\$1,000) heretofore advanced to them as expense money as hereinbefore provided.

"(16) It is further agreed that the said Chas. F. Brown and Richard H. Lord will procure to be conveyed to the said Wapato Irrigation Company one-third of all the acreage in three certain allotments under said Moses Agreement; one made to Ne-quel-e-kin or Wapato John, being allotment number eight (8); one made to Que-til-qua-soon, or Peter, being allotment number ten (10); and one made to Ke-up-kin or Celesta, (commonly known as Sylvester) being allotment number twelve (12), and the said Wapato Irrigation Company agrees to pay said Chas. F. Brown and Richard H. Lord the sum of Three Thousand Dollars (\$3,000) and seven and one-half per cent (7 $\frac{1}{2}$ %) of the purchase price of said lands as commission for said purchase, and said Wapato Irrigation Company reserves to itself the right to determine whether or not it will accept and pay for said lands after said Chas. F. Brown and Richard H. Lord have secured the consents of the said allottees to the sale thereof; and should said Wapato Irrigation Company decide after said consents have been obtained not to purchase said lands, they agree to pay said Chas. F. Brown and Richard H. Lord the sum of

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three thousand dollars (\$3,000) in full and complete compensation for their services in the matter.

“(17) Said Chas. F. Brown and Richard H. Lord further agree that they will honestly and diligently, acting at all times in good faith, endeavor to procure all of the lands in the three allotments hereinbefore described except so much of each allotment as is by law necessary to be retained by the said Indian allottees and the Wapato Irrigation Company agrees to pay to the said Chas. F. Brown and Richard H. Lord in the same manner and in the same amounts for the land so procured as is previously provided, in case they secure only one-third of each of the three allotments, and the said Wapato Irrigation Company agrees that after the deeds have been procured to the first five allotments hereinbefore mentioned, that they will advance to the said Chas. F. Brown and Richard H. Lord the sum of One Thousand Dollars (\$1,000) to be merely advanced and to be repaid to the said Wapato Irrigation Company out of the commission on said purchase price of said lands due said Chas. F. Brown and Richard H. Lord upon the obtaining the deeds of the three allottees above named.

“(18) It is further agreed that the purchase price to be paid for said allotments, unless otherwise agreed, shall be as follows: for allotment number eight not to exceed the sum of Fifty Dollars per acre; for allotment number ten (10) not to exceed the sum of Fifty Dollars (\$50) per acre; and for allotment number twelve (12) not to exceed the sum of twenty-five Dollars (\$25) per acre.

“(19) It is further agreed that in case said Wapato Irrigation Company shall secure title to any of said three allotments, eight (8), ten (10) and twelve (12), through any source whatever within one year from the date of the delivery of deeds to the Wapato Irrigation Company of lands purchased in the first five allotments above mentioned the said Wapato Irrigation Company shall pay to the parties of the first part the said Three Thousand Dollars (\$3,000) and the said seven and one-half per cent ($7\frac{1}{2}\%$) commission as above indicated the same as if the said consent and deeds had been secured through said parties of the first part.

“(20) If the said Wapato Irrigation Company shall acquire title to the lands in this instrument above described and specified as being its purpose to secure, or any part

thereof, said Chas. F. Brown and Richard H. Lord acting promptly and faithfully therein, and shall place the same upon the market for sale, it will appoint as its sole and only agents for that purpose in the cities of Chelan and Wenatchee, said Chas. F. Brown and Richard H. Lord, the property to be listed to them at the lowest price at which said lands may be sold by any agent, and to pay them a commission of five per cent (5%) upon the total sales, and five per cent (5%) additional commission upon the amount of sales made by them, the commission to be paid in the following manner: Four-fifths (4-5) of the commission to be paid when one-fifth (1-5) of the purchase price is paid to the Wapato Irrigation Company, and the remaining one-fifth (1-5) of the commission to be paid when two-fifths (2-5) of the purchase price has been paid to the Wapato Irrigation Company.

“(21) Said Chas. F. Brown and Richard H. Lord, as such agents, agree that they will at their own proper cost and expense, procure all necessary local advertising; that they shall have open for inspection a properly kept set of books, outlining the doings of their agency, which shall at all times be open to the inspection of the Wapato Irrigation Company, its officers, or representatives, it being understood that the Wapato Irrigation Company shall furnish to Messrs. Brown and Lord, proper advertising matter, and do such general advertising as it may see fit, and that they shall do all advertising to be done in the city of Seattle, Washington.

“(22) In Witness Whereof, the parties of the first part have hereunto set their hands and seals, and the party of the second part has signed these presents by its vice-president and secretary, and has caused its corporate seal to be attached hereto, on this 27th day of March, A. D. 1909.”

Immediately after the execution of the agreement, Lord and Brown entered upon its performance. In due time they procured consents of the Indians to portions of allotments numbered 9, 11, 13, 14, mentioned in paragraphs 8, 9, 10, 12 and 13 of the agreement, and a portion of allotment numbered 12, mentioned in paragraph 16. These consents were approved by the interior department and conveyances were made to the irrigation company for the lands described there-

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in. The company also purchased of Lord and Brown the lands described in paragraph 15 of the agreement, paying therefor the agreed purchase price. It also paid the commissions and percentages agreed to be paid for obtaining the consents to the allotments enumerated as procured, and no dispute arises in this action as to the sufficiency of these payments.

On December 10, 1910, Brown assigned all his interests in the contract to Lord, and since that time has not further participated in any of the matters pertaining to it. On the 23d of the same month, Lord met with the directors and stockholders of the company at Seattle, and there announced his inability to procure any part of allotments 8 or 10, mentioned in paragraph 16 of the agreement, at the prices named in the agreement. The directors of the company thereupon took steps to procure the consents through another source, and after due time did procure them through the interior department, although at a large expense and at prices considerably in excess of the prices named in the agreement. The title to the property was secured within one year from the date of the deeds to the land purchased which lay within the five allotments previously mentioned, and Brown and Lord claimed the commissions and percentages agreed to be paid for procuring the same, basing their claim on paragraph 19 of the agreement. The purchasers, however, refused to recognize the claim, and the right to recover these sums is one of the disputed questions in the present action.

Of the lands described in the agreement, the irrigation company acquired 4,197.21 acres. It also acquired various other tracts in the same vicinity, some of which it acquired through Lord and Brown, but under agreements not connected with the agreement here in suit, its total holdings so acquired aggregating some 7,000 acres. In the summer of 1911, it platted into orchard tracts a portion of the lands, and put the platted portions upon the market for sale, tendering to Lord a general agency for their sale at scheduled

prices, at a commission of five per cent on the purchase price. Lord concededly made one sale for which a commission of five per cent was tendered him. This commission Lord refused to accept, contending that, under the agreement, he was entitled to a commission of ten per cent. He also claims to have made, and the court found, that he was the procuring cause of one additional sale. The correctness of this finding is in dispute on this appeal. On September 20, 1911, the appellants entered into a contract of sale with Swalwell & Swartout, a corporation, by the terms of which the appellants agreed to sell, and the corporation agreed to purchase, 5,000 acres of the appellants' holdings, at a price of \$200 per acre, payable in annual installments of \$200,000 each, commencing with December 1, 1912. By the terms of the contract, the lands could be selected from any part of the appellants' holdings by the purchaser; those acquired through sources other than the agreement with Brown and Lord, as well as those acquired within the agreement. No part of the purchase price was paid at the time of the execution of the contract.

Prior to this last mentioned sale, the irrigation company had conveyed to certain of its stockholders 115.84 acres of the land (called in the books of the company a dividend), which it charged to them at the rate of \$200 per acre. It had also sold to sundry other persons lands aggregating in quantity 39.27 acres, at a price of \$15,344. The sales found by the court to have been made by Lord aggregated 10.54 acres, and were sold for the sum of \$3,212.

This action was instituted by Lord alone; he claiming the sole beneficiary interest under the contract in virtue of the assignment made to him by Brown. His first claim is for the commissions and percentages on the purchase of allotments 8 and 10, mentioned as acquired by the appellants through the intercession of officers of the interior department. His second claim is for commissions as selling agent, under paragraphs 20 and 21 of the agreement, his contention being

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that, under that part of the agreement, he is entitled to a commission of 10 per cent on all lands sold through his own procurement, and five per cent on all sales made by the company through its own efforts or through the efforts of other agents. The trial court decided in his favor on both claims, awarding him \$6,000 on the first, and \$42,572.40 on the last, with interest on the first sum from the date of the procurement of the property, and on the latter from the dates of the respective sales.

The record is voluminous and it would be unprofitable to attempt a review of it here at length. Our examination of it convinces us that it justified the conclusion of the trial judge that the respondent is entitled to recover the stipulated commissions on the purchase of allotments 8 and 10. Against this holding the appellants make four principal contentions: (1) that the agreement was terminated as to these purchases, as well as in all other respects, at the Seattle meeting of December 23d, 1910; (2) that the entire agreement was abrogated by the assignment from Brown to Lord; (3) that the land was not purchased by the appellants at the price limited in the agreement with Brown and Lord; and (4) because there was a modification of the contract, or, perhaps better, a construction put upon the contract by Lord, at a meeting held in Wenatchee, Washington, at which time he demanded and received compensation for procuring consents for the first five allotments, which fixed the time for the running of the one-year period, and the allotments in question were not procured by the company's efforts within one year from that time.

As to the first proposition, we cannot agree that the agreement was terminated in its entirety at the Seattle meeting mentioned. Doubtless the appellants' representatives terminated and abrogated it as far as they could do so individually, but it is equally clear that Lord did not consent to such abrogation. While he was paid and while he accepted such sums as were due under the contract up to that time, he

did not waive his right to any sum that thereafter might become due.

The claim that the contract was abrogated in its entirety by the assignment of Lord to Brown we think is equally without merit. It is, as we hereafter show, a well settled principle of law that contracts which call for professional personal services requiring special qualifications or skill, are not assignable by the person who has undertaken to perform the services, but Brown could assign his interests in the contract in so far as they were earned, and we think that the interests now in question were so earned. It is not questioned that Brown and Lord acted at all times in good faith, and made an honest and diligent effort to secure the consents. Their efforts failed because the Indians would not sell at the prices they were permitted to offer. That it was thought possible that failure might be the result of the negotiations is made clear by the clause of the contract which provides for the payment of stated commissions in the case the company should secure title to the property through some other source than the efforts of the brokers. No such provision was inserted with reference to any of the other allotments. Its insertion with reference to these must have been for some purpose; and it would be difficult to conceive of a purpose if it were not thought that failure might result notwithstanding the efforts of the brokers. It must follow, we think, that the commission was earned under the contract in so far as performance by the brokers was concerned. Their right to payment was dependent, of course, on the ability of the company to secure title from some other source within the time limited, but clearly the assignment under such circumstances did not bar the right to recover if the property was procured within that period.

Nor do we think the clause in the agreement limiting the price Lord and Brown were authorized to pay for the property in any way affected the brokers' right to recover under this particular clause. The two are in no way made depend-

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ent, and it is not reasonable to suppose that it was thought that the company could, through some other source, purchase the property at the prices named in the agreement should the brokers fail to purchase it at that price. To our mind the more reasonable construction is that the brokers desired compensation for their services whether the same were successful or unsuccessful, and the company was willing to allow the compensation subject to the limitation imposed. True, the compensation of the brokers proves to be greater under the existing conditions than it would have been had the brokers succeeded in their efforts, but it is a sufficient answer to any objection based on this fact to say that such is the language of the agreement. Had the brokers not acted in good faith a different question would have been presented. But there is no question on this score. As we say, it is conceded on all sides that they acted honestly and diligently, and made a good faith effort to obtain the property according to the terms of the agreement.

The Wenatchee meeting, thought to fix the time when the one-year limitation period began to run, was held on April 13, 1909. Prior to that time the brokers had procured written consents for the sale of allotments 9, 11, 13, and 15, and had notified appellants to that effect. The consents for the sale of allotment 14 had not then been obtained, not that its owners had refused to sell, but, because of their number and complex interests, negotiations with them had not been concluded. The appellants, however, desired to present the consents obtained at once to the secretary of the interior at Washington for his approval or rejection, and the meeting was arranged that the appellants counsel might inspect them, and if found satisfactory, carry them to Washington. At the meeting the brokers insisted that, by the terms of the agreement, they were entitled to the compensation provided therein for procuring the consents at the time of their delivery. On its being objected that the consents for allotment 14 had

not then been obtained, and further that the compensation was not due until they had been approved by the secretary, they refused to deliver up those that had been obtained, preferring to hold them until the negotiations for allotment 14 had been completed. After some further consideration, the appellants paid the compensation, when the consents then obtained were delivered to them. It was claimed by the appellants, and they offered to show, that a modification of the agreement was there made, by which the consent for allotment 12 was substituted for allotment 14, but the trial court ruled the evidence inadmissible. No evidence was offered, however, tending to show that the agreement was modified with respect to the time the limitation period began to run, further than the mere agreement to substitute the one allotment for the other would affect that period. It is our opinion that the facts admitted do not justify the claim that the limitation period began to run at that time, nor would the result be changed were we to consider it as proven that the claimed substitution was made. In paragraph 14 of the agreement it is provided that "when said consents [meaning the consents for the first five mentioned allotments] shall have been procured and delivered to the said Wapato Irrigation Company, then the said Wapato Irrigation Company shall pay to the said" brokers the compensation therein contracted for. The language fixing the time when the limitation period shall begin to run is (paragraph 19 of the agreement) "within one year from the date of the delivery of deeds to the Wapato Irrigation Company of lands purchased in the first five allotments above mentioned." It was known to the parties, at the time of the execution of the agreement, that the approval of the secretary of the interior could not be obtained and deed delivered immediately upon the delivery by the brokers of the consents to the irrigation company, but that some time must elapse between the two events. Having this knowledge, it seems to us that it would be a perversion of the direct language of the contract to hold that the parties by

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naming the latter event meant the former. Since the title to lots 8 and 10 were obtained within one year from the date of the final deeds to the first five allotments, we cannot conclude that the limitation period had run. But counsel say:

"We have already pointed out that appellants, by postponing closing the John and Peter purchases sixty days from the actual time that they acquired them, March 27, 1911, could have avoided this whole claim for commission on these allotments. The fact that appellants did not wait is the best proof in the world that they considered the written agreement fully terminated and finished."

But we cannot think the premise here assumed a basis on which liability could have been avoided. The appellants, as well as the brokers, were obligated to exercise good faith in the performance of the conditions imposed upon them by the agreement, and, clearly, it would not have been the exercise of good faith to have delayed action in acquiring the deeds for the sole purpose of avoiding this liability.

The respondent is also entitled to recover a commission on the sales found by the trial court to have been made by him subsequent to the time the lands were placed upon the market for sale. As to one of these, known as the McCarten sale, there is no dispute, it being conceded by the appellants that he was the procuring cause of the sale. As to the other, the Finch sale, there is a dispute as to whether he was the procuring cause of the sale, but we are not able to say that the evidence concerning it preponderates against the finding of the trial court. Our conclusion is, however, that he is entitled to a five per cent commission on these sales, not a ten per cent commission as the trial court found. Our reasons for the conclusion will appear in the discussion of the succeeding propositions.

As to the sales found by the court to have been made by the appellants themselves, we think the court erred in finding that the respondent was entitled to a commission upon them. The first contention made in support of the finding is that

the respondent has a vested interest, in virtue of the terms of the agreement, in the property to the value of such commissions. It is our opinion that the agreement does not bear this interpretation. The clauses of the agreement having reference to selling agents is found in the paragraphs thereof numbered 20 and 21. Paragraph 20 provides that if the appellants shall acquire title to the lands described in the agreement as being its purpose to secure, or any part thereof, "said Charles F. Brown and Richard H. Lord acting promptly and faithfully therein," and the purchaser shall put the land upon the market for sale, "it will appoint as its sole and only agents for that purpose in the cities of Chelan and Wenatchee said Charles F. Brown and Richard Lord . . . and pay them a commission of five per cent (5%) upon the total sales, and five per cent (5%) additional commission upon the amount of sales made by them, . . ." It will be observed that there is here no present creation of an agency for selling the lands as there is in the preceding part of the agreement for purchasing the lands. The agreement is in the nature of a promise to appoint. It was made to depend upon two stated contingencies, namely, that the brokers acted "promptly and faithfully therein," and that the purchasers should place the property upon the market for sale. The latter contingency depended absolutely upon the will of the purchasers. They were at liberty to withhold the lands from the market if they so chose without incurring liability to the brokers. This privilege or option is utterly inconsistent with the idea of a vested interest. "A vested interest can mean nothing else than an interest in respect of which there is a fixed right of present or future enjoyment." *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408. A promise, made subject to a contingency dependent upon the will of the promisor, does not create such an interest, and the promise here made was so subject. Therefore, there is nothing in the agreement itself, we conclude, that vests in the broker a

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right to commissions on sales made of the lands by the purchasers themselves.

There is another reason, also, which we think fatal to the right of the respondent to recover the commissions here claimed. There has been no performance, or tender of performance, by the brokers of the selling agency clause of the agreement. It will be observed that the brokers were to have the sole and exclusive agency for the sale of the lands at the cities of Chelan and Wenatchee. These cities, the evidence shows, were the places at which the principal sales of the property would be made. This clearly contemplated that the brokers were to render services in some degree commensurate with the compensation they were to receive. Even if the agreement, under any construction of its terms, vested in the brokers a right to commission on the entire sales, it could be so only in the case the brokers performed, or tendered performance, of its conditions in their entirety. They could not perform in part only, refuse to perform in another, and still receive the commission. Now, if any tender of performance was made at all, it was made by the respondent alone. But he could not perform individually. The agreement does not contain a promise to appoint either of the brokers individually as a selling agent, but the promise is to appoint them jointly. The other party to the contract was entitled to the services of both brokers, and a tender of performance by one then was not a compliance with the imposed conditions. Moreover, a contract to perform services of this nature is not assignable by the person agreeing to perform the service, without the consent of the other party. The services involved required special qualifications and fitness, and were not delegable as of right by one of the parties to the other. *Bleecker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 111 Am. St. 922, 2 L. R. A. (N. S.) 392.

But the respondent contends, and the trial court seems to have found, that the assignment from Brown to the re-

spondent was made with the approval and consent of the appellants, and that the appellants recognized the respondent's right to act individually, not only by actually appointing him as selling agent, but by their answer to the complaint in the case at bar. In our view of the record, however, these contentions are not justified by the evidence. The contention that the assignment was made with the approval and consent of the appellants is founded upon certain transactions had immediately before and immediately succeeding that event. It appears that Brown and Lord were "having trouble" between themselves, and that one Bissett, an attorney at law, who had at times performed legal services for the appellants, and one Swalwell, a director in the appellant companies, consulted with Lord about the desirability of purchasing Brown's interests and forming a corporation to take the selling agency of the lands, and a tentative agreement was had between them to that effect. Lord thereafter purchased Brown's interests, paying the consideration therefor out of his own funds. But, without further detailing the transaction, we think it demonstrated that this was merely a personal arrangement and understanding between the parties themselves, with which the appellants had nothing to do; that Bissett was acting in his own interests, not for the appellants, and that Swalwell's participation therein was subject to the approval of his co-directors. When the scheme was broached to the other directors, a majority of them refused to consent to the arrangement, and no further effort was made to carry it into effect.

The contention that the appellants are estopped by their answer to deny approval and ratification of the assignment is equally without foundation. In his complaint the respondent set forth the assignment of Brown to himself, and averred that it was made with the consent and approval of the appellants, and was subsequently ratified by them. The appellants, in their answer, admitted the assignment, but denied the other allegations averred concerning it. They also, by

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way of a separate defense, set up an abrogation of the contract by the mutual consent of the parties, and a full settlement of all matters and differences growing out of the same. By a second separate defense, they pleaded a breach of the undertaking to procure consents to the sale of the land in allotments 8 and 10, and, by reason of such breach, they were delayed in the prosecution of the enterprise, were compelled to procure the land through other sources, at a great expense to themselves, and at a price in excess of that at which the brokers agreed to procure the property, to their damage in a large sum of money, for which they demand judgment against the respondent. Concerning this, counsel say:

"They first plead no contract and then proceed to specify damages and demand judgment under the contract, the effect of which is to render their pleading of no force, as an answer on this point. The two positions are so absolutely inconsistent that neither can stand; the proof of the one would necessarily destroy and disprove the other, and vice versa. There is therefore no issue raised in the case upon plaintiff's averment that the Brown assignment was taken by plaintiff with the full knowledge, consent, acquiescence and subsequent ratification of both of defendants."

But, as we view it, there is no inconsistency in the plea of abrogation of the contract and the demand of damages for a breach of its conditions. The inconsistency lies in the fact that a demand of damages is made after a plea that the parties settled their differences in full. It could well be that a party could recover damages for the breach of a contract, even after it had been abrogated by mutual consent, but no recovery could be had for a breach after the parties had settled their differences in full. But this is not the inconsistency aimed at by the rule on which the respondent relies. The rule is intended to prevent false swearing and perjury. In a court of justice, where truth is the result sought, a party cannot be heard to testify that certain statements of fact are true in support of one branch of his case, and deny their

truth in support of another. But defenses are inconsistent only when one of them is necessarily false. Here no such condition is presented. It can be true that the appellants have been damaged by a breach of the contract on the part of the brokers, and that the parties have had a full and complete settlement of the matters arising out of the breach. A witness testifying to both state of facts will not subject himself to the pains and penalties of perjury. The appellants, of course, cannot, in the final judgment, have the benefit of both the settlement and the counterclaim. But they may consistently plead both, and may have the benefit of the settlement, if in the judgment of the court their proofs sustain the plea of settlement; or, failing in that, may have a judgment in damages, if their proofs sustain the plea of damages.

The contention that the appellants actually appointed the respondent as selling agent under the provision of the agreement is founded upon letters passing to the respondent from the president of the appellant corporations, and on a conversation between the respondent and director Green, had subsequent to the meeting of December 23, 1910. The letters are lengthy and the testimony concerning the conversation occupies many pages of the record, and it would be unprofitable to review them at length. The letters undoubtedly show a desire on the part of the appellants to have Lord's services as a selling agent for their lands and show a willingness on their part to pay him a regular agent's commission on all sales made by him, but we are unable to find in them anything supporting the contention that the respondent was substituted as selling agent in lieu of the agents named in the agreement. They were letters such as would be sent to any agent. They stated the conditions which an agent must comply with in making sales, and distinctly stated that the commissions would be five per cent. This, also, as we have before stated, is the commission tendered the respondent on the receipt of the report of the first sale. True, counsel say

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of this tender, that it "undoubtedly discloses another of the smooth tricks of" the president of the corporations "in an attempt to 'slip one over' on Lord," but we see in it nothing more than the fulfillment of the agreement the appellants understood had been made with him.

The conversation between the respondent and Green, as testified to by the respondent, is in the main as follows:

"We had finished our luncheon by this time and Mr. Green said to me that he would like to talk with me, invited me to walk with him down to his office, asked if I had time and I told him I had plenty of time, I was there on that business only, and the party broke up. Mr. Green and I left the hotel together and we walked down to his office, down on some dock I believe it is, and we talked about this on the way down, that is, he talked a great deal to me; he said he hadn't known—he didn't know of the existence of this contract when he bought in there and that if it wasn't for the very friendly relation between himself and Mr. Backus or the Backuses that there would be some law on this matter, and he further said to me, he said, 'Now,' he says, 'Mr. Lord,' he says, 'we don't want to quarrel over this matter, I don't want to quarrel with you and you don't want to quarrel with us.' I said I certainly did not, I would like to have my commissions as they were earned and I was anxious to go ahead with the contract, and he says 'Now you do that,' he says, 'you go over there, we are ready to sell these lands, now you go over there and you just pitch into this work and show these people that you are just the man that they are looking for, and you may be just exactly the man we are looking for, the man that we want to handle that land, you may be the best man in the country, we don't know,' and he says 'you claim you have got a good contract, we say it is not a good contract; now you are entitled to your opinion and we are entitled to ours,' and he says, 'you do nothing that will in any way injure your contract, go over there and go to work, but don't do anything that will injure your contract in any way, and show us that you can sell these lands, we don't think you can.' I told him that I never expected to sell all those lands, didn't expect to when I signed the contract; and he says 'well, will you—you will go over there and go to work, will you?' I says 'I will go over there and go to work right under that

contract and I will do everything I can to sell the land and I will advertise in accordance with that contract, I will do everything that I agreed to do.' 'Well,' he says, 'you think it is a good contract, we think it is not, so there we are; go ahead and show us that you are the man for the place over there.' And that was about the—that is about the sum and total of the conversation as I remember it at this time."

And at a subsequent meeting in the presence of directors Green, Swalwell and Backus:

"Well, they told me at that time that they did not owe me anything at all, didn't owe me a cent, and I remember very distinctly that Mr. Green said to me that—he says 'You have threatened to sue us and that was no way to do, that wasn't the right way for you to do.' I said 'Mr. Green, it is just the reverse, you have told me that if I got anything from this company that I would have to sue to get it,' and he says 'If you want—' he says, 'if you want us to, then go ahead and sue,' he says, 'we will have a nice friendly lawsuit,' he says, 'if we lose, why, we will pay of course, there isn't any use to fall out about it; if you think you have got a claim against us, why, go ahead and sue us, it can be a nice friendly affair, if you can collect, all right, we will pay, we are able to pay.' And he turned to Mr. Joe Swalwell—I remember this distinctly—he turned to Joe and he says 'That is the proper way to get it isn't it, Joe?' and Joe says 'I think there is better ways than that,' or words to that effect; but they made it very clear to me at that time that if I got anything that I had to sue to get it. Now, I didn't argue very much with those people at that meeting or any other, except to demand what I thought was coming to me and I insisted on it; of course it was owing me."

The version given by Green differs materially from the respondent's but conceding the latter's version to be true, we think it falls far short of justifying the conclusion that the appellants ratified the assignment of Brown's interest in the original agreement to the respondent, or substituted the respondent as sales agent under the agreement in the place and stead of the persons named therein.

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The appellants assign error on the refusal of the court to permit them to introduce evidence in support of their second affirmative defense. The nature of this defense we have heretofore sufficiently indicated. The claim of error is founded on the contention that the agreement of the brokers to procure assignments of the named portions of allotments 8 and 10 was absolute, and for a breach thereof they are entitled to counterclaim in damages. The agreement, in our opinion, will not bear this construction. Without further analysis of its provisions, we think it nothing more than the employment of brokers to negotiate on behalf of the employers for the purchase of certain specified lands, and that the brokers fulfilled their part of the contract when they in good faith used their best endeavor to procure the property. This is the natural construction of the contract when considered with reference to the services to be rendered, and is emphasized by the clause therein wherein it is agreed to pay stated commissions even though the land be procured through other sources than the efforts of the brokers.

We conclude, therefore, that the respondent is entitled to recover the sum of \$6,000 as commission for the purchase of allotments 8 and 10; the sum of \$90 as a commission on the sale to McCarten; the sum of \$70.60 as a commission on the sale to Finch, with interest at the legal rate on the first and last mentioned sums from the date the same became due and payable. The judgment is reversed, and remanded with instructions to enter judgment accordingly.

Crow, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 11710. Department Two. September 17, 1914.]

C. H. HORNBERG, *Appellant*, v. J. M. SCHNATTERLY,
Respondent.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, where the evidence was all oral and given in open court, where the trial judge had opportunity to see and hear the witnesses testify.

Appeal from a judgment of the superior court for Spokane county, Holcomb, J., entered June 27, 1913, upon findings in favor of the defendant, in an action on promissory notes, tried to the court. Affirmed.

John C. Kleber, for appellant.

John Pattison, for respondent.

PARKER, J.—The plaintiff seeks recovery from the defendant upon two promissory notes given in part payment of the purchase price of an automobile in June, 1910. The defendant pleads accord and satisfaction, alleging the making of an agreement with the plaintiff by which the automobile was to be returned to the plaintiff and the debt evidenced by the notes thereby satisfied, in compliance with which agreement the automobile was returned to the plaintiff about December 1, 1910, and the agreement thereby fully executed on the part of the defendant. A trial before the court without a jury resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

There is nothing involved in this appeal other than questions of fact touching the making and execution of the accord and satisfaction agreement, as to both of which questions the testimony is in sharp conflict. We deem it sufficient to say that we have carefully reviewed the whole of the evidence contained in the record before us, and feel constrained to agree with the learned trial court in concluding

¹Reported in 142 Pac. 1160.

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that the debt evidenced by the notes was satisfied by the return of the automobile as claimed by respondent, in view of the fact that the evidence was all oral and given in open court, where the trial judge had opportunity to see and hear the witnesses testify. While the testimony of the appellant and respondent themselves was of such conflicting character, if standing alone, as to probably render respondent's defense of accord and satisfaction unavailing to him, in view of the burden of proof being upon him, we think the trial court was warranted in considering the testimony of other witnesses, though not wholly free from conflict, as preponderating in respondent's favor. See *Hackett v. Scott*, 59 Wash. 390, 109 Pac. 1030.

The judgment is affirmed.

CROW, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 11916. Department Two. September 17, 1914.]

JOHN G. F. HIEBER, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—NEGLIGENCE—DAMAGE TO ABUTTERS—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show the measure of damages resulting to a building through negligent acts of a city in the construction of a bridge, caused by vibration from the running of machinery and the casting of soot, cinders, and grease upon and against the building, where it fails to show to what extent the damage was increased by the city's negligence beyond that necessarily resulting from a prosecution of the work in a manner free from negligence, there being no attempt to prove the amount of damages resulting from the city's negligence apart from the resulting consequential damages for which the city was not liable.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 26, 1913, in favor of the defendant, upon withdrawing the case from the

¹Reported in 142 Pac. 1171.

jury at the close of plaintiff's case, in an action for damages to property by reason of obstructions in a street. Affirmed.

E. O. Connor, for appellant.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant,
and *Dale D. Drain*, for respondent.

PARKER, J.—This is a second appeal of this cause. In disposing of the former appeal, we granted a new trial to the city, our decision being reported in 78 Wash. 122, 131 Pac. 478. The plaintiff seeks recovery for damages which he claims the city caused to his building while carrying on the construction of the Monroe street bridge, a public improvement, upon the approach of which the building fronts. The damages are claimed to be the result of the city casting from its engine and machinery, used in the construction and located in the street near the building, soot, cinders, grease, etc., upon and against the building, and also from the vibrations of the earth and building, caused by the running of the engine and machinery. At the close of the plaintiff's evidence, the trial court, upon motion of counsel for the city, took the case from the jury, deciding, as a matter of law, in substance, that the evidence was such as to render it impossible for the court or jury to determine what portion of the claimed damage was the result of negligence on the part of the city, and what portion thereof was necessarily incident to the doing of such public work free from negligence, and, the city not being liable for mere consequential damages such as would necessarily result from the proper doing of the work, but only liable for damages resulting from its negligence, there was no evidence by which damages caused by the city's negligence could be measured. From this disposition of the cause, the plaintiff has appealed.

Our disposition of the cause upon the former appeal, granting a new trial to the city, was rested upon the ground that the court refused requested instructions predicated upon the theory of negligence, the effect of the court's instruc-

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tions being that, although the city might occupy the street, it could not use it or the appliances necessary to carry on its public work without being liable for damages which might result therefrom to the plaintiff, regardless of whether such damage was caused by the city's negligence or necessarily resulted from the proper doing of the work. By that decision, it became the settled law of the case that the city could be held liable only for damages resulting from its negligence. The cause was remanded to the trial court for a new trial upon this theory.

The only question to be considered here is: Was the evidence offered in behalf of the plaintiff such as to enable the jury to measure the amount of his damage resulting from negligent acts of the city? Counsel for appellant assert that such measure of damage was capable of being made by the jury from the evidence introduced. Counsel, however, has not called our attention to any particular portions of the evidence so indicating in his brief, nor does he cite us to pages of the abstract of the evidence or statement of facts where any such evidence may be found. We have, however, carefully read all of the evidence as contained in his abstract of the evidence, and are unable to find therein any measurable amount of damage resulting to appellant's building from negligent acts of the city. The evidence does tend to show inconvenience and financial loss of some considerable seriousness resulting to appellant from the construction of this public work by the city, by reason of its proximity to his building. We may go further and say that the evidence tends to show some degree of negligence on the part of the city, but it wholly fails to show to what extent appellant's damage was increased by the city's negligence beyond that which would have necessarily resulted to appellant from the prosecution of the work by the city in a manner free from negligence, for which consequential damages the city was not liable. We agree with the learned trial judge that there was no evidence furnishing any measure of

damage resulting from the negligent acts of the city. Indeed, there was no attempt to make any proof of the amount of damages resulting from the city's negligence separate from the manifestly large proportion of resulting consequential damage for which the city was not liable.

We conclude that the learned trial judge properly disposed of the cause, and the judgment is therefore affirmed.

CROW, C. J., FULLERTON, MORRIS, and MOUNT, JJ., concur.

[No. 11600. Department Two. September 17, 1914.]

HERRING-HALL-MARVIN SAFE COMPANY, *Respondent*, v.
PURCELL SAFE COMPANY, *Appellant*.¹

ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE—TENDER—RIGHT TO SUE. Where it is stipulated in a contract that all differences between the parties arising out of the contract shall be submitted to a board of arbitrators, whose decision therein shall be final and conclusive, no action can be maintained on the contract until after a tender of arbitration of differences to the other party and a refusal thereof.

ARBITRATION AND AWARD—CONTRACTS—DISPUTE BETWEEN PARTIES—DUTY TO ARBITRATE—EVIDENCE. Findings that there was no dispute between parties calling for arbitration in such case, is not sustained by the evidence, where there was a clear dispute in the pleadings, and defendant's officers testified to their faithful performance of the contract and its breach by plaintiff, and plaintiff retaliated by attempting to show defendant's nonperformance and its termination by such breach, and upon a second cause of action, the defendant offered evidence of the amount due and its nonpayment, while plaintiff offered evidence of breach and sought to counterclaim for damages.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 17, 1913, upon findings in favor of the plaintiff, in consolidated actions for replevin and on an account stated, tried to the court. Reversed.

¹Reported in 142 Pac. 1153.

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Gay & Kellerman and Hughes, McMicken, Dovell & Ramsey,
for appellant.

Charles P. Spooner and George R. Biddle, for respondent.

FULLERTON, J.—On April 4, 1911, the respondent, Herring-Hall-Marvin Safe Company, entered into a contract with the appellant, Purcell Safe Company, by the terms of which it appointed the latter company its exclusive selling agent, “for the sale and distribution of all of its products, now or hereafter manufactured or handled by it (including especially constructed, contract, bank vaults, and safe deposit work) in and for the states of Oregon, Washington, and Alaska, and that portion of Idaho and Montana now in the Purcell Safe Company’s territory.” It further agreed to consign stock to the Purcell company to the amount of \$20,000, and from time to time additional stock, so as to maintain the consigned stock at the above mentioned figure; further agreeing to sell outright to the respondent company such of its stock as the respondent desired to purchase, allowing it a credit of \$15,000. In consideration thereof the appellant company agreed to diligently cover the territory through agencies, traveling men and other means, and to deal exclusively in the respondent’s wares. It agreed to send to the respondent company a complete list of all sales of consigned stock on the first of each month, and to remit therefor in thirty days after the date of each sale unless otherwise agreed upon. It also agreed to pay for stock sold outright to it at the end of forty-five days from the date of the arrival of such stock at its destination. The contract contained this further provision, namely:

“Any dispute which may arise between the parties hereto shall be left to the decision of a board of arbitration consisting of one member selected by the party of the first part and one member selected by the party of the second part. In case these two selected members cannot reach an agreement, they shall select a third member of the board. The decision of a majority of this board shall be final and both parties

hereto agree to accept such decision of a majority as final and binding."

On June 11, 1912, the respondent began two actions against the appellant, the one an action in replevin to recover goods, wares and merchandise, which it alleged the appellant wrongfully and unlawfully withheld from it, and which were of the value of \$16,469.85; the other an action on an account stated in the sum of \$6,377.50.

The appellant, for answer to the replevin action, admitted that it was, at the time of the commencement of the action, in possession of the goods, wares, and merchandise described in the complaint, but denied that its possession was wrongful or unlawful, or that it wrongfully or unlawfully withheld the same from the possession of the respondent; denying further that its value was \$16,469.85, or of any greater value than \$8,523.51. For an affirmative defense it set up the contract between itself and appellant, before mentioned, and averred that the goods sought to be recovered were goods assigned to it in virtue of the contract; averring further that the respondent had not complied with the conditions of the contract, and had announced that the contract was terminated, and that it would not further comply with such conditions; further averring that, by reason thereof, it had then been damaged by such breach, and would in the future be damaged thereby, in a total sum of \$122,689.48. For answer to the action on the account stated, it denied the allegation as to the amount due, and set up affirmatively the same defense it had set up to the replevin action. For reply the respondent admitted the execution of the contract set up in the answer, and admitted that it had terminated the same, but denied all the other allegations of the answer.

After issue joined, the actions were consolidated, and tried to the court without a jury. On the trial, at the close of the respondent's evidence, the appellant moved for a nonsuit, based on the ground that the respondent had not offered to arbitrate, or demanded an arbitration, of the differences

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growing out of the agreement. The court overruled the motion, and, at the conclusion of all the evidence, announced a decision in favor of the respondent, according to the prayers of the complaint. Judgment was subsequently entered, and this appeal is prosecuted therefrom.

Of the errors assigned, the only one we find it necessary to notice is the refusal of the court to grant the motion for nonsuit. The refusal to grant this motion we think was error. We have held in a long line of cases that, where parties enter into a contract, and provide therein that all differences between them that may thereafter arise out of the contract shall be submitted to a board of arbitrators whose decision therein shall be conclusive and final upon the parties, no action can be maintained on the contract by either party until he has tendered arbitration of the differences to the other party, and such other party has refused the tender. *Hughes v. Bravinder*, 9 Wash. 595, 38 Pac. 209; *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136; *Lidgerwood Park Water Works Co. v. Spokane*, 19 Wash. 365, 53 Pac. 352; *Herman v. Plummer*, 20 Wash. 363, 55 Pac. 315; *Zindorf Construction Co. v. Western Am. Co.*, 27 Wash. 31, 67 Pac. 374; *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373; *Winsor v. German Sav. & L. Soc.*, 31 Wash. 365, 72 Pac. 66; *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97; *State ex rel. Noble v. Bowlby*, 74 Wash. 54, 132 Pac. 723.

The trial court rested its decision on the ground that, at the time of the commencement of the action, there existed no matter in dispute between the parties, and made a finding to that effect. In our opinion this conclusion finds no support in the evidence. As will be observed from our statement of the issues, there was a clear dispute in the pleadings on all of the matters essential to a recovery by the respondent. The evidence bore out the allegations of the pleadings. In the replevin action, the officers of the appellant testified to the faithful performance of the contract on the part of the

appellant and its breach by the respondent, to its damage. The respondent retaliated by attempting to show a nonperformance of the contract by the appellant, its right to terminate, and its termination thereof because of such breach. In support of its second action, the respondent offered testimony as to an amount due and of its nonpayment. The appellant offered evidence tending to show a breach of the contract under which the indebtedness was incurred, and sought to counterclaim in damages caused by reason of the breach. Here, clearly, there was a substantial dispute arising out of the contract. It may be that the appellant's claims are not meritorious, or that the weight of the evidence is against it, and that the decision of the court was right upon the merits, but this does not justify a finding that there is no dispute between the parties. The merits of the dispute were not for the court to decide. The parties had agreed upon another tribunal to determine them, and that tribunal might reach another conclusion. It is the fact that a dispute had arisen, not the merits of the dispute, that bars the right to resort to the courts before the remedies provided in the contract for determining them are exhausted.

The respondent suggests a further reason why it should not be compelled to resort to arbitration before bringing action in the courts. It is claimed that the appellant is a wrongdoer; that it is disposing of the consigned stock without accounting for it as the contract requires; that it has thus violated the *status quo* of the parties, and the arbitrators can afford it no adequate relief. But this claim assumes as true the very matter in dispute. It assumes that the appellant has violated the agreement, which, as we have shown, is the controlling issue in the case, and the very issue the parties agreed should be submitted to arbitration. Nor do we think there is any merit in the contention that the arbitrators can afford no adequate relief even should they find that the contract has been violated in the respect mentioned. We know of no reason why they may not find on

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all of the facts, and make to the respondent such an award as will make it whole in the premises.

Were it shown that the appellant was insolvent, and unable to respond to the award of the arbitrators, the court might, perhaps, in a proceeding ancillary to the arbitration proceedings, take such steps as were necessary to preserve the property on hand pending the termination of the arbitration, but this question can better be determined when it is regularly presented.

The judgment appealed from is reversed, and the cause remanded with instructions to dismiss the action.

CROW, C. J., PARKER, and MOUNT, JJ., concur.

[No. 11974. Department Two. September 17, 1914.]

CHRISTIAN D. HANSEN *et al.*, *Appellants*, v. POLSON LOGGING
COMPANY, *Respondent*.¹

RAILROADS — RIGHT OF WAY — LOCATION OF ROAD — SUBSTANTIAL COMPLIANCE. Where a deed granting a right of way for a railroad contained certain conditions relating to the location of the road across streams on the land, so as not to interfere with logging operations therein, and provided "that said right of way and the railroad and logging road thereon shall be placed as near as practicable to the hill so as not to injure the prairie land more than is necessary," but failed to further describe the hill or prairie land, construction of the road over a route selected by the grantee was a substantial compliance with the conditions of the deed, where the evidence showed that the road, though not constructed as near the hill as practicable, complied more nearly with other conditions of the deed as a feasible and practicable road, and it was shown that the grantor had visited the property while the road was being constructed and made no objection to the location.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered August 26, 1913, upon find-

¹Reported in 142 Pac. 1169.

ings in favor of the defendant, after a trial on the merits before the court, in an action of ejectment. Affirmed.

William E. Campbell, for appellants.

Bridges & Bruener, for respondent.

FULLERTON, J.—On January 27, 1906, the appellants, for a substantial consideration, conveyed to the respondent, by deed, a strip of land fifty feet in width, being twenty-five feet on each side of the center line of the railroad track of the respondent as the same might be thereafter surveyed, laid out, constructed and operated through, across, and over certain specifically described fractional parts of sections 20, 21, 28, 29 and 38, in Township 20, North of Range 10, West of the Willamette Meridian. The conveyance was limited in its duration to such period as the respondent, its successors and assigns should use the land for railroad and logging road purposes. The deed contained a number of conditions, one of which was that the road as located should not cross the creeks and streams on the land so as to interfere with “any new dam being built thereon,” or with the sluicing of logs in such streams, and it was provided that all damage done to the railroad when constructed by the sluicing of logs should be borne by the respondent. The deed also contained the further provision, namely: “And it is further agreed that said right of way and the railroad and logging road thereon shall be placed as near as practicable to the hill so as not to injure the prairie land more than is necessary.” No description of the hill or prairie land is given further than is contained in this clause of the deed. It appeared from the evidence, however, that a somewhat level tract of land lay within the boundaries of the fractional parts of sections 28 and 29, which was commonly known as Axford prairie, and that to the north of this was a hill that extended in a northwesterly and southeasterly direction across the north part of the lands described as being in section 28, and the northeast quarter of the lands described as being in section

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29, against which the north side of the prairie abutted. The east and west boundary of the prairie are not very clearly defined, but it seems to have extended from near the east boundary of the appellants' land in section 28, westerly to a line slightly beyond the center line of section 29.

The respondent definitely located its line of road through the premises in 1907. It made two, and for the greater part of the way three, distinct surveys; one called the X line, which ran through the southern part of the prairie; another which began near the northwest corner of section 29 and followed practically a straight line to eastern boundary of the appellants' land near the center of the west half of section 28; a third was run to the north of the last mentioned line, following more closely the sinuosities of the foot of the hill. In definitely locating the road, the respondent adopted the straight line mentioned. In giving reasons for the selection of this line the respondent's witnesses stated that it was the most practicable course for a road of the two northern lines mentioned, and more nearly complied with the terms of the conveyance than did the X line; that near the center of section 29 was a creek, running in a southerly direction, known as Hansen creek, on which there was a sluice dam placed near the northern boundary of the section, and the straight line crossed this creek at the most feasible place for a bridge over the same, sufficiently far away so as not to interfere with the sluicing of logs through the dam, or the breaking up of log jams that were liable to accumulate in the creek immediately below the dam; that the line adopted also afforded better facilities than would a line further north for complying with certain other conditions of the deed, namely, the putting in of a spur track, the construction of the cattle and team crossings, and crossings for hauling logs thereover.

The appellant's evidence tended to show that a feasible road could have been built nearer the hill by a line intersecting the prairie land some distance north of the place

where the adopted line intersects it, and crossing Hansen creek some 250 feet north and closer to the dam than the adopted line crosses it. It was conceded, however, by all of the witnesses that this line was not as practicable a line for a railroad as the one adopted, since it would require some four additional curves, and require much deeper excavations to bring it to grade, than was required by the adopted line. It was in testimony also that it would cross Hansen creek on an angle, making it more difficult to construct and maintain a bridge which would stand the erosion caused by floating logs under it. The road as located runs close to the hill through a portion of section 28, but gradually departs therefrom as it proceeds westerly, the extreme distance reached being some 350 or 400 feet.

The road was actually constructed in 1912. Concerning the occurrences during its construction, the court found the following facts:

"On April 13th, 1912, the defendant in the construction of its road, had just reached the edge of what is termed the 'prairie' on plaintiffs' lands, and had graded and constructed its road a distance of about nine hundred feet westward from a point where plaintiffs now contend defendant should have turned to the north from its present constructed road, about three hundred feet of said finished road being upon the lands of the said plaintiffs and extending just to the edge of what is termed the prairie. On that day one of the plaintiffs rode over the defendant's road as far as the cars were running, and then walked on the graded road up to the edge of the prairie, thus observing the part that was constructed and also the portion that was graded, and could see the direction the defendant company was taking and he made no objection whatsoever to the construction of the road where it was nor to the course on which the road was being extended. On said day, to wit: April 13th, 1912, the right of way which had been definitely located and staked out across plaintiffs' lands in the year 1907, had been cleared of all brush, stumps, etc., and defendant's employees were working on said road on plaintiffs' lands where the road now is.

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"In the month of July or August, 1912, the plaintiff C. D. Hansen and his family, camped for a week on the so-called prairie, and at that time the road was graded and the track laid across plaintiffs' lands as far as Hansen Creek, and the defendant had commenced the construction of the bridge across said Hansen Creek, which bridge is a very substantial and expensive bridge of its kind. Said C. D. Hansen made no objection at that time to the location of the said road, but remained silent and allowed the said defendant to construct and complete its said bridge where it now is and construct about eight hundred feet of track westward beyond the said creek, which the said plaintiffs now are objecting to."

The appellants conceived that the respondent had violated the condition of the deed relative to the location of the road across the prairie, and brought this action to require it to remove the road from its present location. The court adjudged the issues against them, and from the judgment entered, they appeal.

Conceding that the condition of the deed upon which the appellants rely is a condition precedent rather than a condition subsequent, we think the court rightly determined the issues upon the facts. While he rested his judgment on the facts found by way of estoppel, in our opinion it could have been rested on the ground that the construction of the road over the route selected was a substantial compliance with the condition of the deed. The right granted was at best indefinite as to its location. The respondent was entitled to a feasible and practicable road. In obeying the particular behest in the deed on which the appellants rely, it was obligated to take into consideration the other conditions mentioned, and to construct its road as far as practicable so as to give effect to all of these conditions. The evidence, to our minds, abundantly justifies the conclusion that it did do so, and without following the matter further, we conclude that the appellants have no cause of complaint.

The judgment is affirmed.

Crow, C. J., PARKER, and MOUNT, JJ., concur.

[No. 11820. Department Two. September 19, 1914.]

ALEXANDER MAXWELL, *Respondent*, v. JAMES LANCASTER
et al., *Appellants*.¹

STATUTES—TITLE AND SUBJECTS—REPEAL OF ACT. The title "an act creating a department of agriculture, providing for the organization and administration thereof, defining the powers and duties of its officers and employees in relation to agriculture . . . providing penalties for the violation thereof, and repealing certain acts and parts of acts," is sufficiently broad to include a provision of the act repealing Rem. & Bal. Code, § 3133, making it the duty of county commissioners to make a yearly levy to meet expenses for horticultural purposes.

STATUTES—TITLE AND SUBJECTS—REPEALING CLAUSE. It is not a valid objection that the title of an act is too general to cover a repealing clause; since the legislature may repeal existing laws as well as create new ones, under a title relating to a general subject.

STATUTES—REPEAL—CONFLICTING LAWS. The enactment of laws in conflict with existing laws works a repeal of the latter, though based upon a nonrelated subject.

STATUTES—REPEAL—INTENT OF LEGISLATURE—CONSTRUCTION. The enactment of 3 Rem. & Bal. Code, § 3000-1 *et seq.*, creating a department of agriculture and including therein the several departments of the state government having supervision over agricultural products, abolishing horticultural districts, and providing for the payment into the general fund of all fees and fines collected, and that the expense of maintaining the department shall be paid out of the general fund without regard to moneys that may be collected and paid therein from the administration of the department, shows an intent to repeal Rem. & Bal. Code, § 3133, providing for the levy of a tax by county commissioners for horticultural purposes.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered December 5, 1913, upon overruling a demurrer to the complaint, in an action to enjoin the levy of a tax. Affirmed.

Parker, Richards & Fontaine, for appellants.

Harold B. Gilbert, for respondent.

¹Reported in 143 Pac. 157.

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FULLERTON, J.—The county commissioners of Yakima county, in making estimates of the amount required to meet the public expenses of that county for the year 1914, included therein the sum of \$15,000 for horticultural purposes, pursuant to the provisions of Rem. & Bal. Code, § 3133 (P. C. 231 § 135). Shortly after the publication of the estimates, this action was begun by the respondent, a resident and taxpayer of the county of Yakima, to restrain and enjoin the commissioners from levying a tax to meet the particular estimate, on the ground that the section of the statute on which the commissioners relied as authorizing the levy had been repealed, and that there was no other statute authorizing such levy. The county commissioners demurred generally to the complaint, which demurrer the trial court overruled. They thereupon elected to stand on the demurrer, and judgment was entered against them according to the prayer of the complaint. This appeal is from the judgment so entered.

To an understanding of the question involved, a short review of the legislative enactments on the subject of horticulture is necessary. The legislature, at its session in 1909, passed an act creating a horticultural department. Laws 1909, p. 495 (Rem. & Bal. Code, § 3069 *et seq*; P. C. 231 § 1). The act created the office of commissioner of horticulture and prescribed the duties of the incumbent thereof. It divided the state into fifteen horticultural districts and provided for the appointment of a district horticultural inspector for each of the several districts. Certain duties were imposed on persons engaged in horticultural pursuits, for the violation of which fines were imposed, and licenses were required from those engaged in the business of selling and dealing in nursery stocks. By § 64 of the act, being § 3133 of the code above mentioned, it was made the duty of the board of county commissioners of each county in the state, at the time of making the regular annual tax levy in each year, to include in such levy a tax in such amount as they should find neces-

sary to meet the expenses for horticultural purposes for the ensuing year. The sum so levied, together with the fines and license fees collected, was required to be paid into the state treasury for the benefit of a "district horticultural fund," and was required to be credited to the horticultural district within which the county levying the tax was included; the sum so collected to be expended for horticultural purposes in such district.

At the session of 1911 (Laws 1911, p. 513; 3 Rem. & Bal. Code, § 3080 *et seq.*), the legislature passed an amendatory act, in which it more specifically defined the duties of the district horticultural inspectors and created a fund called the "horticultural fund," from which it was provided should be paid the salaries, compensation and expenses of district inspectors and their assistants, and into which fund should be paid all fines imposed and collected and all the inspection and license fees imposed or collected under the provisions of the act, together with such appropriations for horticultural purposes as are made by the legislature of the state of Washington. And in the general appropriation bill at that session, \$75,000 was appropriated from the general fund for the benefit of the horticultural fund.

At the session of 1913, the legislature passed an act creating a department of agriculture. Laws 1913, p. 196 (3 Rem. & Bal. Code, § 3000-1 *et seq.*). The act was entitled:

"An act creating a department of agriculture, providing for the organization and administration thereof, defining the powers and duties of its officers and employees in relation to agriculture, horticulture, live stock, dairying, state fairs, goods, drinks, drugs, oils, and other kindred subjects, providing penalties for the violation thereof, and repealing certain acts and parts of acts."

By the provisions of the act, the department was charged with the administration of the laws relating to agriculture, agricultural resources and products, horticulture, livestock, foods, drugs, and oils, and such other subjects as the legis-

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lature should from time to time provide. The office of commissioner of horticulture was created, and the incumbent given authority to exercise the powers vested by law in and theretofore required to be performed by the state veterinarian, the state food and drug commissioner, the commissioner of horticulture, the district horticultural inspectors, the state oil inspector, the state fair commissioners, the Southwest Washington fair commission, the state commissioner of labor, in so far as his duties concerned the supervision and inspection of bakeries and bake shops, the duties of the department of animal husbandry in respect to the registry and licensing of stallions and jacks, and the duties of the Washington agricultural experiment station in respect to commercial fertilizers used for manurial purposes. The act left in force the provisions of the earlier acts with reference to fees and fines, and provided that all moneys collected from such sources should be paid into the state general fund, and that all moneys then in the state agricultural fund should be transferred to the state general fund; further providing that all salaries and expenses incurred under the provisions of the act should be paid from the general fund out of moneys appropriated for that purpose. The act contains a repealing section, in which the sections of the existing laws intended to be repealed are scheduled. This schedule includes § 64 of the original horticultural act before mentioned, which makes it the duty of the several boards of county commissioners to levy a horticultural tax. It also contained a general repealing clause, providing that all acts and parts of acts in conflict therewith were repealed. The general appropriation act of the session carried appropriations for the various departments thus placed under the jurisdiction of the department of agriculture in the sum of \$210,800.

It is the contention of the appellants that § 64 of the original horticultural act is still in force, notwithstanding it is within the schedule of the sections declared repealed by the

later agricultural act. The particular contention is that the title of the later act is not broad enough to include a provision containing a repealing clause, and hence the attempted repeal of the section, not being expressed in the title of the act, is inimical to § 19 of art. 2 of the state constitution, which provides:

“No bill shall embrace more than one subject and that shall be expressed in the title.”

Arguendo their counsel say:

“This act does not purport to be an act covering the general subject of horticulture, or even agriculture, nor does it enact a general law in regard thereto. It is simply an act creating a department of agriculture, providing for the organization and administration thereof and defining the powers and duties of its officers and employees in relation to agriculture, horticulture, etc. Nowhere in the title of the act is there anything to suggest that it deals with the general subject of agriculture or horticulture, or that its purpose is to amend or repeal the general horticultural laws. There is nothing to call the attention of a person reading the title to the fact that the body of the act makes any change in the general laws relating to horticulture or the raising of revenue for the enforcement thereof. Apparently from its title the sole purpose of the act is to create a commission who shall have charge of certain matters pertaining to agriculture, live stock, dairying, etc. The act undertakes to define the powers of such a commission and its employees, but does not in its title or elsewhere state that its purpose is to define the powers and duties of county commissioners or other state or county officials in so far as they relate to agriculture or horticulture or the raising of revenue. There is absolutely nothing in the title of the act to indicate or call to anyone’s attention what acts or parts of acts are to be repealed. The acts or parts of acts which it attempts to repeal in the fourteenth section are not designated in the title of the act, either by subject or number, and we think, under the rule as repeatedly announced by this court, an act which attempts to amend or repeal a statute without reference to it by either name or number is repugnant to the pro-

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vision of the constitution above referred to, and cannot stand."

But while counsel's statement is forceful, we cannot agree with the conclusions reached. The general rules relating to titles of legislative acts with respect to expression of the subject-matter are well settled. The title need not be an index to the body of the act, nor need it express in detail every phase of the subject which is dealt with by the act. The essential requirement is notice, and the title is sufficient if it gives reasonable notice of the subject legislated upon. As we said in the early case of *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

"The purpose of the title is only to call attention to the subject-matter of the act, and the act itself must be looked to for a full description of the powers conferred."

Nor need the title be expressed in any special form of words or in any particular manner. If the subject of the act can be reasonably gathered from reading the title as a whole, the subject is sufficiently expressed therein. Tested by these rules, we are clear that the title here in question is sufficient. No one, it seems to us, can read it without being aware that the subject legislated upon is agriculture and the co-related sub-subjects enumerated therein, one of which is the subject of horticulture. Horticulture is a branch of agriculture and can be included in an act relating to agriculture, without violating the rule which prohibits the union in one act of disconnected and unrelated matters. The title also gives notice that certain acts and parts of acts are repealed. It is said that this is too general to cover a repealing clause; but, conceding this to be so, it would not affect the validity of the repealing section in this instance. The legislature may, under a title relating to a general subject, repeal existing laws as well as create new ones. Moreover, existing laws are superseded by the enactment of conflicting laws, even though the later law may be upon a nonrelated subject.

Counsel have discussed the question of intent of the legislature, and argue for the conclusion that there was no intent to repeal this particular section. But here, again, we cannot concur. Our synopsis of the contents of the later act shows a radical change in the policy of the state with respect to its supervision over agricultural products and the means adopted to finance such supervision. By this act all of the several departments in this branch of the state government, which had been theretofore administered by separate and distinct boards and officers, are gathered under one department which is given the general supervision of the whole. Horticultural districts theretofore existing are abolished, and the whole state is included in one general district. Fees and fines collected in the course of the administration of the department are paid into the general fund, and are subject to appropriation for general purposes as other moneys therein are subject. All expenses incurred in the administration of the department are paid out of the general fund without regard to the moneys that may be collected and paid therein from the administration of the department. So with the levy here in question. If it were collected it would not inure to the especial benefit of the county of Yakima. Any sum so collected must be paid into the state treasury for the benefit of the general fund, and, if used at all during the existing biennium, may be used for the benefit of the state at large for its general purposes. It is not even required to be used for the benefit of the agricultural department of the state, much less for the benefit of horticulture in the particular county making the levy. The policy of the state, as indicated by the existing statute, is now to support the department which has supervision of horticulture by general taxation of the whole state, and not by such limited taxation as the several boards of county commissioners may see fit to levy. If, therefore, the question of legislative intent is the subject of inquiry here at all, we think a consideration of the general purposes and effect of the act shows an intent to repeal

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this particular section rather than suffer it to remain in force.

We shall not review the many cases which appellants' counsel have cited to maintain their position. While they are enlightening on the general principle involved and are, as we believe, correctly decided, their facts distinguish them from the present case.

Our conclusion is that the judgment should be affirmed, and it is so ordered.

CROW, C. J., MOUNT, and PARKER, JJ., concur.

[No. 11969. Department One. September 21, 1914.]

**SADIE EGHOLM, *Appellant*, v. E. E. WILLIAMS *et al.*,
Respondents.¹**

APPEAL—RECORD—REVIEW. Where respondent filed no supplemental abstract or moved against appellant's abstract for failure to comply with the statute and court rules, and made no appearance in the supreme court, the cause will be determined upon the findings of the trial court and the appellant's abstract.

PARTNERSHIP—RETIREMENT OF PARTNER—LIABILITY—NOTICE. A retiring partner is liable for the wages of an employee who entered upon employment prior to dissolution of the partnership, in the absence of notice of dissolution, or knowledge of facts sufficient to charge notice or impose the duty of making inquiry.

Appeal by plaintiff from a judgment of the superior court for King county, Dykeman, J., entered January 3, 1914, upon findings in favor of the plaintiff as against one defendant, in an action on contract, tried to the court. Reversed.

Howard O. Durk, for appellant.

MAIN, J.—The plaintiff brought this action against the defendants, E. E. Williams and wife, and B. F. Scanlon and

¹Reported in 143 Pac. 152.

wife, for the purpose of recovering wages alleged to be due for services rendered. Williams and wife defaulted. Scanlon and wife answered the complaint by general denial. The cause was tried to the court without a jury. Judgment for the sum of \$442 was rendered in favor of the plaintiff, and against Williams and wife only. This appeal is prosecuted by the plaintiff, claiming that the court erred in declining to render a judgment against Scanlon and wife also.

The trial court, in substance, found the facts to be as follows: On January 20, 1913, Williams and Scanlon entered into a partnership agreement, whereby they were to conduct a bath house, called Raleigh Sanitarium & Turkish Baths, in the city of Seattle. On the 25th day of January, the bath house was opened. The business was conducted by the partnership until the 20th day of February, 1913. After this date, the partnership was dissolved, and Williams leased the institution from Scanlon. The plaintiff was employed by Williams to work as a bath house attendant, and pursuant to said employment, entered upon the performance of her duties on the 20th day of February, 1913, and continued thereafter at such employment until July 9, 1913.

The appellant has filed an abstract of the record. No supplemental abstract has been presented. Neither has the appellant's abstract been moved against for failure to comply with the statute and court rules. In fact, no appearance has been made, and no brief filed in this court by the respondents. The cause must therefore be determined upon the findings of the trial court, and the appellant's abstract.

From the facts stated, it appears that the partnership was in existence on the 20th day of February, the date the appellant entered upon her employment, and for some time prior thereto. The lease was made on the 22d day of February. Let it be assumed that the lease worked a dissolution of the partnership. In the abstract, there is no evidence of a dissolution, other than a reference to the lease. It thus appears that the plaintiff had been employed, and had entered upon

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her employment, prior to the dissolution. The liability of the partners for the compensation for her services would continue until the appellant either had notice of the dissolution, or knowledge of facts which would charge her with notice, or impose the duty of making inquiry. The abstract is silent upon the question of notice, either actual or of facts that would charge notice. Scanlon having been a member of the partnership when the employment began, and there being no notice, or facts which charge notice, to the appellant of the dissolution, it follows that judgment must be rendered against Scanlon and wife, as well as against Williams and wife.

The cause will be remanded with instructions to the superior court to enter a judgment against Scanlon and wife.

Crow, C. J., Gose, Ellis, and Chadwick, JJ., concur.

[No. 12014. Department One. September 21, 1914.]

ORILLA LUMBER COMPANY *et al.*, Appellants, v. CHICAGO,
MILWAUKEE & PUGET SOUND RAILWAY COMPANY *et al.*,
*Respondents.*¹

SALES—OF GOODS—WHEN TITLE PASSES—BONA FIDE PURCHASERS. Where the agent of the consignor of lumber presented the bill of lading and invoice to the consignee and requested payment of ninety per cent of purchase price, according to the terms of sale, but left the papers in the consignee's office upon assurance that the invoice would be checked up and the lumber paid for, the consignee, however, later refusing to pay or surrender the bill of lading, title to the lumber remained in the consignor, and although the consignee transferred the lumber to a *bona fide* purchaser for value and without notice.

SAME—TRANSFER OF TITLE—BILL OF LADING. In such case, the fact that the consignee was also named in the bill of lading as consignor would not change the rule, since the presumption of ownership arising from a transfer of the bill of lading may be explained or rebutted by evidence showing the real ownership of the goods.

¹Reported in 143 Pac. 152.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 13, 1914, upon findings in favor of the intervener, in an action of replevin, tried to the court. Reversed.

Million & Houser and George Friend, for appellants.

Ernest B. Herald and William A. Holzheimer, for respondents.

Gose, J.—This is an action of replevin, brought by the Orilla Lumber Company, a corporation, against the defendant railroad company, to recover a carload of lumber. The Pioneer Lumber Company intervened, alleging that it owned the lumber. Pending the action, a receiver was appointed for the Orilla Lumber Company. The Pioneer Lumber Company prevailed below. This appeal followed. The Orilla Lumber Company will hereafter be referred to as the appellant.

The facts are these: The appellant sold the lumber in controversy to the Alexander Page Lumber Company. The terms of the sale were ninety per cent cash, to be paid on the presentation of the invoice and bill of lading. The lumber was put aboard the car at Orilla. The railroad company issued a straight, nonnegotiable bill of lading, in conformity with the provisions of Rem. & Bal. Code, § 3386 *et seq.* (P. C. 433 § 5). Alexander Page Lumber Company was named in the bill of lading as both the consignor and the consignee. On the same day, an employee of the appellant presented the bill of lading and invoice to the Page Lumber Company, and demanded payment conformably to the terms of the sale.

The court found that the appellant,

“by its agent, C. S. Gregory, took said bill of lading and the invoice for said lumber and presented the same to the Alexander Page Lumber Co. at the city of Seattle on said date and requested the payment of 90% of the agreed purchase price therefor, and that at said time Alexander Page, the

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manager, was not in the office, but the man in charge of the office requested said Gregory to leave said bill of lading and invoice so that it could be checked up and returned at one o'clock p. m. of said day and get a check for said 90%, and that pursuant to said suggestion said Gregory left said bill of lading and invoice in the office of the Alexander Page Lumber Co. and thereafter at one o'clock p. m. of said day he returned and demanded on behalf of the plaintiff that said Alexander Page Lumber Co. should pay the said 90% or return said bill of lading, but was informed by said Alexander Page that neither the money would be paid nor the bill of lading returned, and that thereafter at about four o'clock p. m. of said day said Gregory again visited the office of said Alexander Page Lumber Co. and again demanded the return of said bill of lading or the payment of said 90%, at which time he was informed by said Alexander Page that they had disposed of the bill of lading and would not return the same and would not pay the said 90%."

It also found that, the day following the issuance of the bill of lading and its presentation to the consignee, the appellant unloaded the car; that a day or two later, the railroad company, against the protest of the appellant, reloaded the lumber and moved the car to Seattle; that thereafter the appellant replevined and took possession of the lumber and sold it. The court further found that the Page Lumber Company, on the day it got possession of the bill of lading, sold the lumber to the respondent, and transferred and delivered the bill of lading to it, and that it was a purchaser for value and without notice. We accept the findings of the court, supplemented by our own statement of the facts, as in harmony with the evidence.

The single question presented by the appeal is, Did the respondent, a purchaser from the Page Lumber Company for value and without notice, acquire title? The general rule is that, where goods are sold upon condition that the price therefor shall be paid upon receipt of an invoice of the goods, the sale is for cash, and the title remains in the seller until the goods are paid for. This is true although the goods

have been delivered to the consignee and sold by it to a *bona fide* purchaser without notice. *Hirschorn v. Canney*, 98 Mass. 149; *Stollenwerck v. Thacher*, 115 Mass. 224; *Hart v. Boston & M. R. R.*, 72 N. H. 410, 56 Atl. 920; *Harmon v. Goetter*, 87 Ala. 325, 6 South. 93. In the *Hirschorn* case, it was held that, where goods were sold and delivered upon the condition that the purchaser should send his notes in payment, the title did not vest in the purchaser until he performed the condition, and that the vendee could convey no title to a *bona fide* purchaser as against a vendor who had not been guilty of laches. The court said:

"It is difficult to see how he can give a good title to a *bona fide* purchaser any more than the bailee of a horse to go a journey can make a valid sale of the horse. If he has no title, how can he communicate one?"

The precise question was before the court in *Stollenwerck v. Thacher*, *supra*. There an agent of the consignor, who was directed to hold a bill of lading until the draft for the purchase price of the goods was paid, delivered the bill of lading unconditionally, it being indorsed in blank. The person to whom the bill of lading was delivered then transferred the goods to the defendant as security for the payment of advances. In considering the rights of the contending parties, the court said:

"But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal. *National Bank of Green Bay v. Dearborn*, *ante*, 219; *Gurney v. Behrend*, 3 E. & B. 622, 632; *Pease v. Gloahec*, L. R. 1 P. C. 219, 228. In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, intrusted with goods merely for the purpose

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of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. *Mussey v. Beecher*, 3 Cush. 511. It follows that Gray & Company, not having paid the draft, nor acquired possession of the bill of lading with the plaintiffs' consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiffs' title. The plaintiffs are therefore entitled to recover."

This court announced a like view in *Rumpf v. Barto*, 10 Wash. 382, 88 Pac. 1129.

The fact that the Page Lumber Company was named in the bill of lading as both consignor and consignee does not change the rule. The general rule is that bills of lading stand as the substitute and representative of the goods described therein.

"The transfer of the bill passes to the transferee the transferor's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it." *The Carlos F. Roses*, 177 U. S. 655.

These authorities announce the general principles of law as applied to such transactions. The case here, however, is much stronger for the appellant. There was not only no intention to deliver the bill of lading, but there was no delivery. The appellant's agent, whose authority was limited to presenting the bill of lading and invoice for the purpose of receiving payment according to the terms of the contract, left the bill of lading in the respondent's office upon the assurance of the party in charge of the office that he would check up the invoice and pay for the goods. When he later returned to receive the money, the Page Lumber Company

refused to either pay for the goods or surrender the bill of lading. It is, of course, true that upon the face of the bill of lading the Page Lumber Company was the apparent owner of the lumber, but it was not the real owner. The appellant has been guilty of neither laches nor negligence. It did the usual thing—presented the bill of lading and invoice for payment; and the bill of lading was retained against its protest, and payment refused.

The respondents have cited a line of cases which hold that one who acquires title to chattels by fraud may transfer an unimpeachable title to a good-faith purchaser; and also holding that, where the seller has a voidable title, a buyer for value and without notice acquires a good title. These are cases, however, where title had passed and the seller sought to rescind because of the fraud of the vendee. The distinction between the two classes of cases is that, in the case at bar, title did not pass.

The judgment is reversed, with directions to enter a judgment in favor of the receiver of the appellant.

CROW, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 11862. Department One. September 21, 1914.]

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,
Appellant, v. EASTERN OREGON BANKING COMPANY
et al., *Respondents*.¹

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—COVENANTS—MORTGAGE BY LESSEE. A mortgage by a lessee upon all the buildings and other personal property upon the leased premises is not invalid by reason of a clause in the lease forbidding assignment of the lease except by written permission of the lessor, it being provided that the buildings should belong to the lessee upon termination of the lease.

LANDLORD AND TENANT—LEASE—DEPENDENT COVENANTS—REMOVAL OF BUILDINGS—CONSTRUCTION. Where a lease for a term of years, at specified rent payable semi-annually and the payment of taxes, provided that the lessee should erect buildings upon the premises to the value of \$5,000, and that the buildings and improvements then located or to be erected on the premises should belong to the lessee at the termination of the agreement, provided they shall be removed within ninety days, otherwise to belong to the lessor, and further provided that the lease should not be assigned without written permission of the lessor, and that failure of the lessee to keep his covenants should operate as a forfeiture of the lease with right of entry and possession by the lessor, the right of the lessee to remove the buildings is not dependent upon the covenants to pay rent and taxes.

SAME—IMPROVEMENTS BY TENANTS—RIGHT OF REMOVAL. In such case, the buildings having become the property of the lessee under the terms of the agreement, he had the right to sell or mortgage the same, hence the right to remove the buildings was not personal to the lessee, but passed to a mortgagee who purchased the property upon foreclosure of his mortgage.

Appeal from a judgment of the superior court for Skamania county, Back, J., entered November 4, 1913, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

W. W. Cotton, Jas. P. Stapleton, A. C. Spencer, and W. A. Robbins, for appellant.

Raymond C. Sly, W. B. Presby, and W. H. Wilson, for respondents.

¹Reported in 143 Pac. 154.

GORE, J.—This is a bill in equity to enjoin the defendants from removing certain buildings located upon property belonging to the plaintiff, at Collins Hot Springs, in Skamania county. There was a decree for the defendants. The plaintiff prosecutes the appeal.

The facts out of which this suit arose are these: On the first day of March, 1903, the Oregon Railroad & Navigation Company, the appellant's predecessor in interest, executed a lease to one C. T. Belcher, embracing the property upon which the buildings are located. The term was ten years "*unless sooner terminated*" as in the lease provided; rent payable semi-annually in advance. The agreed rental for the first five years was \$311 per year, and all taxes levied upon the property and upon the improvements. For the second five years, the rental was \$622 per year, plus such taxes, it being agreed that the taxes should be paid before they became delinquent. It is stipulated in the lease that:

"The party of the second part [the lessee] hereby further agrees to erect proper hotel buildings and bath houses upon the premises, and to expend on such improvements during the first term of five years a sum not less than five thousand (\$5,000) dollars, and further agrees that all permanent improvements to the hot springs located on the premises, and all pipes, sewers, and conduits laid under the surface of the ground and leading to and from said springs and buildings shall, at the expiration of this agreement from whatever cause, become the property of the party of the first part; it being mutually understood and agreed that all buildings and superstructures now located or to be erected on the premises shall *at the termination of this agreement* be and remain the sole and exclusive property of the party of the second part; provided, the same shall be removed from the said premises within ninety days immediately succeeding the date of the termination of this agreement, *and if not so removed*, then and in that case the said buildings shall become the property of the party of the first part."

The lease further provides that the lessee "shall have no power to assign this lease to any other person or persons

except by written permission of the party of the first part." It also provides: "Failure by the lessee to keep and perform any stipulation or condition of this lease shall operate as a *forfeiture* thereof, and the lessor may take immediate possession of said demised premises, together with all and any buildings or improvements thereon, whether placed there by the lessee or by any other party, and *terminate the tenancy created hereby*." The italics are ours. On the 17th day of November, 1910, the lessee, Belcher, assigned the lease to F. A. Young, with the written consent of the appellant. Young thereupon entered into the possession of the leased premises, and continued in the possession thereof until February 17, 1913, eleven days before the expiration of the term. In November, 1911, F. A. Young executed his promissory note to one L. B. Young, and secured the same by mortgage upon all the buildings and other personal property upon the leased premises, and upon the same day, F. A. Young assigned the lease to L. B. Young, without the consent of the appellant. The testimony shows that the lease was assigned for the purpose of supplementing the mortgage security. In December, 1911, L. B. Young assigned the note and mortgage securing the same, and also the lease, to the respondent Eastern Oregon Banking Company, a corporation, without the consent of the appellant. Neither L. B. Young nor the Eastern Oregon Banking Company ever entered into the possession of the premises or made any claim to the right to do so. The banking company foreclosed its chattel mortgage upon the buildings by notice and sale, and the property was sold to the banking company on the 17th day of February, 1913. On that date, F. A. Young, who was then in default for six months' rent, amounting to \$311, and for taxes amounting to \$553.87, in response to a demand upon the part of the appellant, surrendered the keys and the possession of the leased premises to it. The Eastern Oregon Banking Company is asserting the right to remove "all buildings and superstructures" from the leased premises.

The appellant first contends that, in view of the clause in the lease to the effect that the lessee "shall have no power to assign this lease" except by written permission of the appellant, the assignment of the lease to L. B. Young, and by her to the banking company, was of no validity. This may be conceded. The testimony shows that the lease was assigned simply for the purpose of supplementing the mortgage security. The broader question is, under the lease and under the admitted facts, did F. A. Young own the buildings and superstructures upon the leased premises, and, if so, could he lawfully mortgage them?

The appellant makes three further contentions, (1) that the clause in the lease forbidding the lessee to assign it embraces all the provisions of the lease; (2) that the covenants in the lease for the semi-annual payment of the rent and for the payment of the taxes, the covenant against assigning without the lessor's consent, and the covenant giving the tenant the right to remove the buildings and superstructures "are mutual and dependent covenants," and that the lessee cannot break the covenants in favor of the lessor and assert the right to enforcement of those which are in his favor; and (3) that the right of the lessee to remove the buildings and superstructures from the premises is a "privilege personal to the lessee," and cannot be exercised by another.

In support of the first contention, the appellant cites *Behrens v. Cloudy*, 50 Wash. 400, 97 Pac. 450. In that case the lease was for the term of five years. It was stipulated in the lease that the lessor agreed to sell the leased property to the lessee "at any time within eight months" from the date of the lease. It was further stipulated that the lessee should not "let or underlet the *whole or any part* of said premises . . . nor assign this lease or any part thereof" without the written consent of the lessor. The lessee attempted to assign her option to purchase the property to the plaintiffs, without the written consent of the lessor, and against his will and protest. The action was for specific

performance of the agreement to sell. The court said that the covenant against assignment extended to and included the option to sell; that the language of the covenant was that the lessee would not let or underlet or assign the lease "or any part thereof" without the written consent of the lessor, and that the option to sell was a part of the lease. The case was correctly decided, but is not controlling here. Appellant also cites *Sandberg v. Light*, 55 Wash. 189, 104 Pac. 205. There the lease included an option to purchase. The lease was abandoned, and the court held that such abandonment carried with it the option; that, from the nature of the case, the two were inseparable. A reading of the lease, which is set forth in the opinion, will disclose the soundness of the view announced, and the wide difference between that lease and the one at bar.

In support of the second contention, the appellant cites *Toellner v. McGinnis*, 55 Wash. 480, 104 Pac. 641, 24 L. R. A. (N. S.) 1082. Again recurring to this lease, we find that the lessee is required to erect hotel buildings and bath houses upon the premises, and to expend on such improvements during the first term of five years a sum not less than \$5,000. It is agreed that all pipes, sewers, and conduits laid under the surface of the ground, "at the expiration of this agreement from whatever cause," shall be the property of the lessor. The lease is equally explicit to the effect that all buildings and superstructures then located upon the premises or thereafter constructed thereon shall, "at the termination of this agreement, be and remain the sole and exclusive property" of the lessee, provided the same shall be removed from the premises within ninety days succeeding "the termination of this agreement," and "if not so removed, then, in that case, the said buildings shall become the property of the party of the first part." It is further agreed that the failure of the lessee to keep his covenants shall operate as a *forfeiture* of the lease, and that upon the happening of that event, the lessor may take possession of the premises,

together with all buildings and improvements, "and *terminate the tenancy created hereby.*"

The parties foresaw that the lease might be terminated within the term. They covered that contingency, as well as a termination in point of time, by providing that, upon *the termination* of the lease, the buildings should be the property of the lessee if removed within ninety days from that time, and if not so removed, they should be the property of the lessor. The contingency of the failure of the lessee to keep his covenants is covered by a stipulation for a forfeiture of the lease. The method of forfeiting the lease is by a reentry and a termination of the tenancy. Forfeitures are not favored in equity, and will not be declared unless the right to that remedy is clearly expressed or necessarily implied. The only express contingency for the ownership of the buildings by the lessor is in the event the lessee fails to remove them within ninety days succeeding the termination of the lease. As was said in *Toellner v. McGinnis, supra*, in determining whether a covenant is dependent or independent, we must look "to the true intent of the parties, to be gathered from a consideration of the whole contract." Taking the contract by its four corners, as there suggested, it cannot be said that the right of the lessee to remove the buildings and superstructures is dependent upon his covenant to pay rent and taxes.

In respect to the suggestion that the right to remove the property is personal to the lessee, it suffices to say that, under the terms of the lease, the buildings and superstructures became the property of the lessee. This being true, he had a right to exercise the dominion of an owner over them, which includes the power to sell or mortgage. We think, under the terms of the lease, that F. A. Young became the owner of the buildings and superstructures. This being true, he had a right to sell or mortgage them. He did mortgage them, and the holder of the mortgage has foreclosed his

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mortgage and purchased the property. It has succeeded to Young's title, and has a right to remove the buildings.

The judgment is affirmed.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

[*En Banc.* September 21, 1914.]

[No. 12284. Initiative Measure No. 7. Bureau of Inspection.]

THE STATE OF WASHINGTON, *on the Relation of Lucy R. Case,*
Plaintiff, v. THE SUPERIOR COURT FOR THURSTON
COUNTY, CLAYPOOL, J. *et al., Defendants.*

[No. 12287. Initiative Measure No. 8. Employment Agencies.]

THE STATE OF WASHINGTON, *on the Relation of I. M. Howell,*
Secretary of State, Plaintiff, v. THE SUPERIOR COURT
FOR THURSTON COUNTY, CLAYPOOL, J. *et al.,*
Defendants.

[No. 12289. Initiative Measure No. 9. First Aid.]

THE STATE OF WASHINGTON, *on the Relation of E. A. Sims,*
Plaintiff, v. THE SUPERIOR COURT FOR THURSTON
COUNTY, MITCHELL, J. *et al., Defendants.*

[No. 12285. Initiative Measure No. 10. Public Highways.]

THE STATE OF WASHINGTON, *on the Relation of Lucy R. Case,*
Plaintiff, v. THE SUPERIOR COURT FOR THURSTON
COUNTY, MITCHELL, J. *et al., Defendants.*

[No. 12286. Initiative Measure No. 12. Tax Commission.]

THE STATE OF WASHINGTON, *on the Relation of Lucy R. Case,*
Plaintiff, v. THE SUPERIOR COURT FOR THURSTON
COUNTY, CLAYPOOL, J. *et al., Defendants.*¹

[Syllabus by the Reporter.]

STATUTES—INITIATION—PETITION—VALID SIGNATURES—DETERMINATION—REVIEW BY COURTS. The determination (under 3 Rem. & Bal. Code, § 4971-1 *et seq.*) of the number of valid signatures upon an

¹Reported in 143 Pac. 461.

initiative petition to submit a measure to a vote of the people, is a political rather than a judicial question, although including an issue of fraud, in the absence of statutory provisions to the contrary; hence the legislature has power to commit the same to administrative officers, and the courts could not, in the absence of express statute, review the determination of such officers.

SAME—REVIEW BY CANVASSING OFFICERS—MINISTERIAL DUTIES. The determinations made by local officers upon questions expressly submitted to them by the law relating to the submission of initiative measures to a vote of the people cannot be reviewed by the secretary of state as a canvassing officer in the absence of express statutory authority therefor, since the duties of canvassing officers are purely ministerial and limited by the express power conferred upon local certifying officers.

SAME—DETERMINATION OF VALID SIGNATURES—REVIEW—LIMITATIONS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-15, providing that, upon submission to him of initiative petitions, the secretary of state "shall proceed to canvass and count the names of certified legal voters on such petition. If he find the same name signed to more than one petition, he shall reject both names from the count," being a special authority to reject names for one reason only, suggests, almost conclusively, a limitation on his power to reject names for any other cause.

SAME—DETERMINATION OF VALID SIGNATURES—POWERS OF SECRETARY OF STATE—LIMITATIONS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-12, providing that, upon an initiative petition being submitted to the secretary of state, he shall examine and file the same "if upon examination said petition appears to be in proper form and to bear the requisite number of signatures of legal voters," merely provides for a preliminary decision by the secretary as to the filing; and the fact that Id., § 4971-13 provides for a review of such preliminary decision in the courts, does not enlarge the scope of the review on an appeal from the secretary's final canvass of the signatures, so as to include in the latter review the question of the number of "signatures of legal voters," where, in the secretary's final canvass, he is only authorized to reject names if he finds the same name signed to more than one petition.

SAME—"CANVASS"—LIMITATIONS—STATUTES—CONSTRUCTION. Under 3 Rem. & Bal. Code, § 4971-15, providing that, upon submission of initiative petitions, the secretary of state shall "canvass" and count the names of certified legal voters, and if he finds the same name signed to more than one petition he shall reject both names from the count, the word "canvass," though meaning to "scrutinize, examine, and determine," does not authorize the secretary of state to do more than scrutinize and examine the petitions to determine the

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number of and reject the duplicate names, that being his only express authority; and the words "canvass and count" are given full effect without finding any intent to authorize the secretary of state to decide the genuineness of the signatures, the forgery of officer's initials, the sufficiency of the certifying officer's certificates, and like questions.

SAME—DETERMINATION OF LEGAL SIGNATURES—APPEAL—NECESSITY—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. Where the secretary of state, upon his canvass of initiative petitions, rejects certain names, but accepts sufficient to put the measure on the ballot, so that his decision as a whole is in favor of the advocates of the measure, they may, on appeal by opponents of the measure, appear in the superior court in opposition to the claims of the opponents seeking reversal of the secretary's decision, without having taken an independent appeal within the five-day limit fixed by law.

SAME—DETERMINATION OF VALID SIGNATURES—LOCAL OFFICERS—CONCLUSIVENESS—REVIEW BY SECRETARY OF STATE—STATUTES—CONSTRUCTION. The secretary of state is without authority, upon the canvass of initiative petitions, to inquire into or decide whether the names signed are the "signatures of legal voters," and when a local certifying officer has decided that names upon a petition are the signatures of legal voters, and has evidenced his decision by a proper certificate, his decision is final; in view of 3 Rem. & Bal. Code, § 4971-8, providing that the person in each precinct having possession of the registration books shall certify that he has carefully compared the signatures on the foregoing petitions with said registration books, and the signatures initialed by him are the signatures of legal voters of the state; and Id., § 4971-8, providing that in precincts where registration is not required, the petition shall be certified by a justice of the peace, road supervisor, member of a school board, or a postmaster, to the effect that he resides in the precinct, is acquainted with the legal voters thereof, and that he believes the signatures initialed by him are the signatures of legal voters of such precinct; and in view of the fact that the only authority for a review of the decisions of such local certifying officers is the provision in Id., § 4971-15, authorizing the secretary of state to canvass and count the names of certified legal voters, and "if he find the same name signed to more than one petition, he shall reject both names from the count."

SAME—DETERMINATION OF LEGAL SIGNATURES—APPEAL—REVIEW BY COURTS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-17, providing that any person dissatisfied with the determination by the secretary of state that an initiative petition does or does not contain the requisite number of signatures of legal voters, may have the same submitted to the superior court by citation or writ for exam-

ination and for a writ compelling certification of the measure, or for an injunction to prevent the same, as the case may be, to be heard and determined by the court, does not authorize the superior court to review the question as to requisite number of signatures of legal voters; since the appeal was to review only errors of the secretary of state and that question could not be determined by the secretary of state, the certificate of local certifying officers being conclusive on that subject on the courts as well as on the secretary of state.

SAME—DETERMINATION OF LOCAL OFFICERS—CONCLUSIVENESS. The finality of the determination of the local certifying officers is not affected by the fact that there is no special provision of law requiring such officers to return their certificate to the secretary of state.

SAME. Such finality in nonregistration precincts is not affected by the fact that the officer is only required to certify as to his "belief" that his initialed signatures were those of qualified voters.

SAME—INITIATION OF MEASURES—FRAUD AND CORRUPTION—ENFORCEMENT OF ACT—STATUTES—CONSTRUCTION. The fact that 3 Rem. & Bal. Code, §§ 4971-31 and 4971-32, provide severe penalties for forgeries, fraud, false reports and certificates, and violations of the provisions of the law for initiation by petition of a measure to be submitted to the vote of the people, and that by Id., § 4971-5, provides for printing a warning of these provisions on every petition circulated, evidences an intent on the part of the legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, of this constitutional right of the people, except as provided for the review of decisions by executive officers.

SAME—INITIATION OF MEASURES—DIRECTORY REQUIREMENTS—USE OF INK. The provisions of 3 Rem. & Bal. Code, § 4971-10, requiring a local certifying officer, in comparing and certifying the signatures on an initiative petition, to place his initials "in ink opposite the signatures of those persons shown by the registration books to be legal voters" is directory to the extent that initialing the signatures with a common lead pencil is a sufficient compliance with the law, in view of the liberal construction accorded election laws, the law not declaring a signature invalid for failure to use ink.

SAME—REQUIREMENTS—FORM OF PETITION. For the same reasons. Id., § 4971-9, prescribing the form of the petitions, in so far as it declares that petitions shall consist of sheets with numbered lines for not more than twenty signatures on each sheet, is directory, in so far as may be considered as limiting the number of signatures that may be placed on any petition.

SAME—FORM OF PETITIONS—BLANK LINES—EVIDENCE OF FRAUD. The fact that the local certifying officer initialed blank lines on such

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a petition, upon which some names were signed, is not of itself such conclusive evidence of fraud on the part of the certifying officer as to authorize the rejection of the duly initialed signatures upon such a petition.

MAIN, GOSE, and CHADWICK, JJ., dissenting.

Certiorari to review judgments of the superior court for Thurston county, Mitchell and Claypool, JJ., entered September 3, 1914, upon appeals from the decisions of the secretary of state, upon canvassing the returns for the submission of initiative measures at the general election. Affirmed as to initiative measures Nos. 8, 9, and 12; reversed as to Nos. 7 and 10.

Teats, Teats & Teats, E. G. Mills, and Malcolm Douglas, for Lucy R. Case, and for I. M. Howell, secretary of state, in cause No. 12287.

The Attorney General and *E. W. Allen, Assistant*, for I. M. Howell, secretary of state, in all the causes.

Kerr & McCord and *Frank C. Owings*, for interveners and defendants in causes Nos. 12284 to 12287 inclusive, and for relator Sims in cause No. 12289.

PARKER, J.—The relators in these cases seek in this court review and reversal of the judgments of the superior court of Thurston county, rendered upon appeals from the decision of the secretary of state upon the questions of submitting to the voters of the state, at the general election of the present year, initiative measures numbered 7, 8, 9, 10, and 12, petitions for which have been filed in his office. The cases are so related in their presentation of questions that for convenience they were, by stipulation, tried at the same time, before the two trial judges for Thurston county, though each judge considered the cases assigned to his department of the trial court and rendered judgments therein separately, as if sitting alone. This resulted in Judge Claypool rendering judgments in the cases involving initiative measures numbered 7, 8, and 12, and Judge Mitchell rendering judgments in cases

involving initiative measures numbered 9 and 10. The cases come here upon separate writs of certiorari, but are all presented by one set of briefs, and have all been argued together.

The contentions of counsel relate to a number of alleged forged and fraudulent signatures upon the petitions, which, it is insisted, should be rejected as invalid signatures, and also, to alleged defects and irregularities in certifying and verifying as proper signatures a number of the names upon the petitions, which, it is insisted, should be rejected. The main problem is, Does the number of valid, properly verified signatures upon the petitions for each of these initiative measures exceed 31,836, which is conceded to be the required number to authorize the submission of initiative measures to the voters at the general election of the present year?

At its session of 1913, the legislature passed an act to facilitate the operation of our constitutional amendment adopted in 1912, relating to the initiative. Laws 1913, p. 418 (3 Rem. & Bal. Code, § 4971-1 *et seq.*). This law, interpreted in the light of the constitutional provision it was enacted to facilitate the operation of, is to guide us in the solution of the problem here presented. It prescribes the duty and power of certain specified local officers touching the verifying of names appearing upon the petitions as being the signatures of legal voters, before the filing of the petitions with the secretary of state; and also prescribes the duty and power of the secretary touching the canvass and counting of the names of certified legal voters upon the petitions, after the filing of them in his office. These respective powers and duties of the local certifying officers and the secretary it will be well to have before us at the outset, to the end that we may the more readily and without repetition note, as we proceed, not only what these respective powers are, but also how they are to be exercised independent of each other, and in the absence of prescribed revisory powers on the part of the secretary of state over the decisions of the local certifying officers touching the particular questions submitted to

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them for decision. Section 5 (§ Rem. & Bal. Code, § 4971-5), of the law prescribes the form of petitions for initiative measures to be substantially followed, which are to be signed by the voters, including the form of verification attached thereto, reading as follows:

"I, the undersigned, hereby certify that I am the officer of the city (town or precinct) of.....county of....., State of Washington, having the custody of the registration books containing the signatures, addresses and precincts of the registered legal voters of said city (town or precinct); that I have carefully compared the signatures on the foregoing petitions with said registration books, and the signatures on the petitions opposite which I have written my initials are the signatures of legal voters of the state of Washington.

"Dated the.....day of....., 19....

.....
 "(Seal) of the city (town or precinct) of

.....
 "ByDeputy."

This form, it will be noticed, applies only to petitions signed by voters residing in precincts where there is registration of voters. For certification of petitions signed by voters residing in precincts where there is no registration of voters, § 8 of the law (§ Rem. & Bal. Code, § 4971-8), provides:

"Blank petitions for circulation in precincts where registration of voters is not required shall bear certificates, in lieu of those contained in the foregoing forms, to be signed by a justice of the peace, road supervisor, member of a school board or a postmaster, to the effect that he resides in the precinct, naming it, and is acquainted with the legal voters thereof and that he believes the signatures opposite which he has written his initials are the signatures of legal voters of such precinct."

The duty and power of the local certifying officers is prescribed by § 10 of the law (§ Rem. & Bal. Code, § 4971-10), as follows:

"Every initiative and referendum petition, before it is filed with the secretary of state as hereinafter provided, shall be filed with the officer having custody of the registration books containing the signatures, addresses and precincts of the registered voters of the city, town or precinct, as the case may be, where the persons who have signed such petition claim to be legal voters. Upon the filing of any such petition it shall be the duty of such officer to forthwith compare or cause a deputy to compare the signatures, addresses and precinct numbers on such petition with said registration books. The officer or deputy making the comparison shall place his initials in ink opposite the signature of those persons who are shown by the registration books to be legal voters, and shall certify upon the last signature sheet of such petition that the signatures so initialed are the signatures of legal voters of the State of Washington, and shall sign such certificate and attach thereto the seal of the registration officer, if such officer have a seal, and return such petition to the person filing the same upon demand. The omission to fill any blank shall not prevent the initialing or certification of any name, if sufficient information is given to enable the officer, by a comparison of the signatures to identify the voter. Every such petition bearing the signatures of persons residing in precincts where registration of voters is not required, before it is filed with the secretary of state, shall be submitted to and initialed and certified by a justice of the peace, road supervisor, member of a school board or a postmaster residing in such precinct in the form provided in section 8 of this act."

Upon the filing of the petitions with the secretary of state, his duty, in so far as it relates to his canvass and count of the names thereon, is prescribed by § 15 of the law (3 Rem. & Bal. Code, § 4971-15), as follows:

"The secretary of state shall . . . proceed to canvass and count the names of certified legal voters on such petition. If he find the same name signed to more than one petition he shall reject both names from the count. . . ."

There is no other language in the law referring in terms to the duties of the secretary touching his "canvass and count" of the names upon the petitions certified by the local certifying officers, or touching his duties so far as they re-

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late to his determination of the sufficiency of the petitions so far as the number of signatures of legal voters thereon is concerned. If the petitions seek the submission of an initiative measure to the voters and are sufficient as to number of valid signatures thereon, the secretary's duty, following his canvass and count, is prescribed by § 19 of the law (3 Rem. & Bal. Code, § 4971-19), as follows:

"If such . . . initiative petition for submission to the people shall be found sufficient, the secretary of state shall at the time and in the manner he certifies to the county auditors of the various counties the names of candidates for state and district officers certify to each county auditor the serial numbers and ballot titles of the several initiative . . . measures to be voted upon at the next ensuing general election"

Section 17 of the law (3 Rem. & Bal. Code, § 4971-17), provides for review of the decision of the secretary, upon the question of the sufficiency of the petitions as to the requisite number of signatures thereon, in the courts, as follows:

"Any citizen who shall be dissatisfied with the determination of the secretary of state that the petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit said petitions to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof, as the case may be, which application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined. No appeal shall be allowed from the decision of the superior court granting or refusing to grant the writ of mandate or injunction, but such decision may be reviewed by the supreme court on a writ of certiorari sued out within five days after the decision of the superior court, and if the supreme court shall decide that a writ of mandate or injunction, as the case may be, should issue, it shall issue such writ direct to the secretary of state; otherwise, it shall dismiss the proceedings, and the clerk of the supreme court shall

forthwith notify the secretary of state of the decision of the supreme court."

Section 1, art. 2, of our constitution as amended in 1912 (see Laws 1911, p. 136), guaranteeing the right of initiative and referendum to the people, prescribes the basis for determining the requisite number of signatures of voters upon petitions, and, also, in a measure, other details as to the time and place of filing petitions and manner of submitting such measures to the voters or to the legislature, as the case may be. These provisions we need not further notice here, since no question is involved calling for their examination in detail; but it is worthy of note, and that we keep in mind as we proceed, that these initiative and referendum provisions of our constitution are all embodied in one section, which contains these words: "This section is self-executing, but legislation may be enacted especially to facilitate its operation." It was in compliance with this language that the legislature passed the act of 1913, the material portions of which we have above reviewed, declaring, in the title of that act, that it is "to facilitate the operation of the provisions of § 1 of art. 2 of the constitution relating to the initiative and referendum." Thus there is strongly suggested, in the language of the constitution and this law, a required liberal construction, to the end that this constitutional right of the people may be *facilitated*, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

Upon the canvass and count of the names upon the petitions by the secretary, he rejected from the petitions for each of these five initiative measures several hundred names appearing thereon as petitioners, upon the sole ground that such names were forged and fraudulent. All of these rejected names were duly certified by the proper local certifying officers to be "signatures of legal voters," in such manner and form as to duly evidence, as the law prescribes, the decision

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and determination of that fact by such local certifying officers. The secretary's decision in rejecting these names was in the main affirmed by the decisions of the superior court, though Judge Claypool rejected from the petitions many more names upon this ground than did Judge Mitchell. The secretary and the superior court evidently arrived at the conclusion that these names were fraudulently signed to the petitions, largely from an inspection and comparison of the hand-writing in which small groups of names appeared. These groups consisted, apparently for the most part, of two names containing the same surname, as if a husband might have signed with his own name and that of his wife, or the wife signed with her own name that of her husband, though many other names were considered by the court and the secretary to have been signed in the handwriting of the same person. However, the grounds of the decisions of the secretary and of the superior court upon the question of the fraudulent signing of these names, and the rejection thereof by them, we regard as of no consequence whatever here, since we have arrived at the conclusion that neither the secretary nor the superior court had any power to determine that these names were not the valid signatures of legal voters, that question having, by express provision of the law, been committed for decision to the specified local certifying officers, and there being no provision whatever in the law authorizing a review of their decision by the secretary. He having no such power of review, the superior court cannot have; in any event, in this proceeding, it being manifest, as we view the law, that it is the rulings and decisions of the secretary on questions which are within his power to decide, and none other, that the courts are authorized to review.

We will now notice, in order, what we conceive to be the limitations upon the power of the secretary and the court in this respect. In approaching the question of the power of the secretary and of the courts in determining questions arising incidental to the submission of an initiative measure to

the voters, it is to be remembered that we are dealing with a political and not a judicial question, except only in so far as there may be express statutory or written constitutional law making the question judicial. Speaking generally, it may be said that the legislature might have committed wholly to administrative officers all questions arising under the law incidental to the submission of initiative measures to the people, without any right of review in the courts whatever, except, possibly, pure questions of law. The determination of the number of valid signatures upon an initiative petition, as we view it, calls for the application of the same general principles of law as in the determination of the number of votes cast at an election, so far as the power of such determination is concerned. In the early case of *Parmeter v. Bourne*, 8 Wash. 45, 38 Pac. 586, 757, the late Chief Justice Dunbar, speaking for this court, held that the superior court has no jurisdiction of the subject-matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud committed in an election determining such question, resting the holding upon the ground that the question was purely political, and the determination of the result of such an election being committed by law to administrative officers (in that case the county commissioners), the courts, in the absence of express statute, could not review the determination of such officers. Among the numerous authorities there cited and reviewed in support of this doctrine by the learned chief justice, we find quoted with approval the language of Justice Campbell of Michigan in *Hipp v. Supervisors*, 62 Mich. 456, 29 N. W. 77, as follows:

"The questions are not such as the courts have any right to disturb after they have been disposed of by the only authority which the law has empowered to act upon them. The supervisors, at a meeting when all the towns were represented, by a two-thirds vote, ordered an election to determine upon the proposed removal of the county seat. This election was held, and the board determined the result upon a canvass. That action is conclusive, and no authority exists anywhere

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to dispute it. The controversy, which is not in any proper sense a judicial one, is closed. The constitution has not empowered this court to settle controversies not judicial, which are very wisely left to the proper local and representative agencies of the people."

This doctrine was adhered to in *Heffner v. Board of County Commissioners*, 16 Wash. 273, 47 Pac. 430, where Justice Anders, speaking for the court, observed in conclusion as follows:

"It appearing that the commissioners have 'received and compared' the returns, and have found, and properly certified to, the facts which the statute expressly submitted to them for determination, we feel constrained to accept their decision as conclusive upon the courts."

Later decisions of this court plainly show that this doctrine has not been departed from in this state. *Nichols v. School District*, 39 Wash. 137, 81 Pac. 325; *Quigley v. Phelps*, 74 Wash. 73, 132 Pac. 738; *Mann v. Wright*, ante p. 358, 142 Pac. 697; 15 Cyc. 393.

This being the law touching the power of the courts to review and control the actions of canvassing officers, it must logically follow that canvassing officers, possessing only statutory powers, cannot review or ignore, in making their canvass, determinations made by local officers upon questions expressly committed to them for decision by statute, when the statute does not give to such canvassing officers any power to review or ignore such determinations. This is the theory upon which it is generally held that the duties of canvassing officers are ministerial, preventing them from going behind the returns the statute imposed upon them the duty of canvassing, in the absence of statutes authorizing them so to do.

In *State ex rel. King v. Trimbell*, 12 Wash. 440, 444, 41 Pac. 183, Chief Justice Hoyt, speaking for the court, said:

"That the duty of canvassing boards is purely ministerial, and confined to tabulating and ascertaining the result of an election as shown by the face of the returns properly made out by the election officers is well established upon both rea-

son and authority. The election laws place the responsibility of determining the result at each election precinct upon the election officers and leave to the canvassing board only the duty of ascertaining the result from the returns made by such officers."

See, also, McCrary, Elections (4th ed.), §§ 261, 262.

Our attention is called to several decisions of the courts, including our own, which, it is insisted, show that the situation here presented is not controlled by this doctrine in so far as the power of the secretary is concerned. We will now notice these decisions, so relied upon by counsel who insist that these names be rejected from the petitions.

In *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, it was held that it was the duty of the city council to determine the qualification of the signers of a petition for the submission of charter amendments to a vote of the people of the city. The alleged applicability of this decision to the situation here involved finds an answer in the language of Justice Hadley, speaking for the court therein, as follows:

"The statute provides no method for determining the qualification of the petitioners. It must follow, therefore, that it lies with the city council, whose action in the premises is invoked, to determine that question in some reasonable manner, and within a reasonable time. Clearly the statute does not intend that the council shall submit the amendment until the fact exists that the necessary number of qualified voters have petitioned. Some one must determine that fact, and under the statute it must lie with the council to pass upon it in the first instance. It is generally held, under similar statutes, that it is the duty of the body to whom petitions for the submission of questions to the voters are presented to carefully scrutinize, examine, and determine as to the number and qualification of the signers before putting the people to the expense of an election. *Ayres v. Moan*, 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501; *La Londe v. Board of Supervisors*, 80 Wis. 380, 49 N. W. 960; *Dutton v. Hanover*, 42 Ohio St. 215; *State v. Eggleston*, 34 Kan. 714, 10 Pac. 3."

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This is but the application of a general rule where no special provision is made by statute for the determination of the qualifications of the petitioners as voters by some specified officer or officers other than the officer or body to whom the petition is addressed, for action thereon. The authorities there cited plainly so show.

In *State ex rel. Chealander v. Carroll*, 57 Wash. 202, 106 Pac. 748, it was held, under a charter provision limiting the right to file declarations of candidacy to those persons "who shall be eligible" for the office sought, that the city comptroller had power to inquire into the eligibility of the candidate so offering to file his declaration, and refuse to file and certify the same if he be in fact ineligible, the comptroller being the officer whose duty it was to receive, file, and act upon such declaration of candidacy, and no other officer being authorized to determine the question of the candidate's eligibility.

In *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309, it was held that the city comptroller was the proper officer to verify the signatures to a petition seeking submission to the voters of an ordinance under the referendum provisions of the city charter, reading:

"The city comptroller shall verify the sufficiency of the signatures to the petition and transmit it, together with his report thereon, to the city council at a regular meeting not less than (20) days after the filing of the petition. The city council shall thereupon provide for the submitting of said ordinance . . . to the vote of the qualified electors for ratification or rejection, . . ."

there being no other provision of law or charter touching the question of who was the proper officer to verify the signatures to the petition. At page 73, Chief Justice Rudkin, speaking for the court, said:

"The charter provides that that officer shall verify the sufficiency of the signatures to the petition, and imposes no duty whatever upon the city council, except to submit the

question to the voters for approval or rejection, at a general or special election on the comptroller's report."

Thus, it was held, in substance, that the council could not review or ignore the decision of the comptroller on the question committed by the charter to him for decision, to wit, the genuineness of the signatures as being those of qualified voters. Just as the power of the council was there limited by the authority conferred on the comptroller, so is the power of the secretary here limited by the express power the statute confers upon the local certifying officers to determine the question of the names upon the petitions being the signatures of legal voters.

In *State v. Olcott*, 62 Ore. 277, 125 Pac. 303, and *State ex rel. Hill v. Olcott* (Ore.), 135 Pac. 902, the supreme court of Oregon held that the secretary of state is charged with the official duty in the first instance to determine whether the signatures upon initiative and referendum petitions are signatures of legal voters, though we are unable to see from the language of these decisions that the power of the secretary in this respect was therein challenged. However, the Oregon law does not provide for the verifying and determination of the genuineness of the signatures as being those of legal voters, by any other official than the secretary, as ours does. It is true that, under the Oregon law, the petitions are to be verified in this respect by an accompanying affidavit of a private individual to the effect: "I believe that each [signer] has stated his name, post office address, and residence correctly, and that each signer is a legal voter of the state of Oregon." But that is not an *official* determination of the genuineness of the signature, nor of the qualification of the signer as a legal voter. So far as applicable to this question, the following decisions, relied upon by counsel seeking the rejection of these names, are distinguishable from the cases before us in this same way: *Woodward v. Barbur*, 59 Ore. 70, 116 Pac. 101; *In re Initiative Petition No. 23*,

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35 Okl. 49, 127 Pac. 862; *State ex rel. Topping v. Houston*, 94 Neb. 445, 148 N. W. 796.

We have noticed that the whole duty of the secretary is prescribed, so far as his canvass and count of the names is concerned, in these words of the statute: He shall "proceed to canvass and count the names of certified legal voters on such petition. If he find the same name signed to more than one petition, he shall reject both names from the count." Having in mind an elementary rule of statutory construction, the special authority here given the secretary to reject duplicate signatures upon different petitions of itself suggests almost conclusively a limitation of power on the part of the secretary to reject names for any other cause, when they are determined to be "signatures of legal voters" by the local certifying officers, and such determination is evidenced by such officers' certificate in the manner prescribed by the law. If it be necessary to look for a reason for conferring this special power upon the secretary, it may be readily found in the fact that he is the first officer to whom all the petitions are presented together when is furnished the first opportunity of determining the number of such duplicate signatures, if any, upon *different* petitions. It is significant that it is "the same name signed to more than one petition" that the secretary is especially authorized to reject. Why this special authorization to reject this certain class of fraudulent signatures, which manifestly is not within the province of the local certifying officer to reject, since he certifies only that the signatures upon a particular petition are the "signatures of legal voters," if he so determines them to be?

Section 12 of the law provides:

"The secretary of state upon any such petition being submitted to him for filing shall examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters, . . . the secretary of state shall accept and file said petition in his office; otherwise, he shall refuse to file the same,

. . .” Laws 1913, p. 424, § 12 (3 Rem. & Bal. Code, § 4971-12).

While the word “petition” is here used in the singular, it manifestly means all of the petitions assembled as one, since the secretary so deals with them. Section 13 of the law (3 Rem. & Bal. Code, § 4971-13), provides for review of this preliminary decision of the secretary touching the filing of the petition in his office, should he refuse to file the petition, in the courts. No question is raised here involving this preliminary decision of the secretary. He accepted and filed all of the petitions tendered for these initiative measures. Our attention is directed to this portion of the law in connection with that portion above reviewed, relating to the final decision of the secretary and review thereof in the courts, with a view of inducing such a construction of the law as a whole as will broaden the field of inquiry of the secretary upon his final determination touching the sufficiency of the petition and the number of valid signatures thereon, so as to include the question of the names upon the petition being “signatures of legal voters.” The argument seems to be that, unless it be held to be the legislative intent that the power of the secretary is not thus broadened, there would have been no provision for this preliminary decision touching the sufficiency of the petitions as to the number of signatures. We cannot assent to this view. The preliminary inquiry and decision of the secretary is manifestly only tentative. The questions he is then to consider and decide in a mere preliminary tentative way are the same questions he is to decide upon a more thorough and detailed examination of the petitions. The legislative thought manifestly was to provide an expeditious manner of review and correction of any erroneous decision made by the secretary touching both the filing of the petitions, if he should refuse to file them, and also, thereafter, the submission of the measures to the people. Here are two stages at which the will of the people might be defeated by an erroneous decision of the secretary.

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This, we think, is simply a method of providing for a speedy remedy in each of these instances. We think it manifest the legislative intent was to not have the question of the right to merely file the petitions hampered by anything more than a superficial examination of them, such as could be readily and quickly made by the secretary. But this, we think, is not a convincing argument that the secretary's inquiry upon his final determination is broadened to include the decision of questions expressly committed for decision to the local certifying officer, when no review of such decision is provided for. The situation may be likened to that confronting a court in a case presenting the question of a preliminary injunction and thereafter a permanent injunction or the refusal thereof. The jurisdiction of the court, so far as the scope of its inquiry is concerned, is not different in the two instances, the only difference being that the first is a preliminary decision more or less tentative, rendered so by the necessities of such cases, while the last is final.

It is insisted that the word "canvass" as here used in connection with the duties of the secretary to "scrutinize, examine, and determine," using the language of learned counsel for the opponents of the measures, makes his duties much more than merely to count the names upon the petition, and that, unless we hold he has power to determine the question of the names upon the petition being the "signatures of legal voters," we will unduly limit the meaning of the word "canvass" as used in connection with the secretary's duties. We may concede that the word canvass is well expressed in the words "scrutinize, examine, and determine," but scrutinize, examine, and determine what? The answer is, the things which the law has committed to his determination, not the things which the law has expressly committed to the decision of other officers. Counsel seem to think that to withhold from the secretary the power to decide the question of the names upon the petition being the "signatures of legal

voters," there is nothing of consequence left for him to scrutinize, examine, and determine. Even if this were true, we think it would not be a convincing argument in favor of holding the secretary's power broad enough to authorize him to decide questions expressly committed for decision to the local certifying officers. But the assumption, we think, is not correct. For instance, the secretary is expressly authorized to reject a name "signed to more than one petition." This surely authorizes him to scrutinize and examine the petitions incident to the determination of that question. The same may be said of other questions he may be called upon to decide, such as the genuineness of the signature of the certifying officer, the forging of such officer's initials opposite to petitioner's name, and the sufficiency of the certifying officer's certificate as to form and substance, as well as other questions which might be suggested. Several of these very questions were in fact decided by the secretary in his "canvass and count" of the names upon these petitions. Manifestly, in the light of these plain duties of the secretary, it becomes wholly unnecessary to look further for duties for him to perform in order to give to the words "canvass and count" full force and effect.

We have seen that objection by appeal to the courts must be taken within five days following the secretary's decision upon the sufficiency of the petition as to the number of signatures. His decision upon the petition for initiative measure No. 9 was that there were fourteen valid signatures thereon in excess of the required 31,836. Relator Sims appealed therefrom to the superior court. Lucy Case, representing the advocates of this measure, was permitted to intervene in the superior court. In doing so, she set up the claim that the secretary had erroneously rejected from the petitions for this measure several hundred names, upon the sole ground that such signatures were forged and fraudulent. This objection in behalf of the advocates of this measure came more than five days after the secretary's decision, but promptly

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after the case came into the superior court. It is now contended that this objection cannot be considered because coming too late by reason of the five-day limitation of the statute. We think the answer to this contention is found in the fact that the advocates of this measure had no occasion to appeal to the courts from the decision of the secretary upon this or any other ground, since his decision as a whole was favorable to their position and would result in placing the measure before the people, if unreversed. That the advocates of this measure had the right to be heard in court in opposition to the contentions of its opponents, we think must be conceded. Their rights in court were, in substance, those of defendants and, we think, such as to entitle them to have offset against any errors which might have been committed by the secretary in favor of submitting the measure, any errors which he might have committed tending to defeat the submission of the measure. The fact that this objection on behalf of the advocates of the measure is put forward merely by way of defense, we are of the opinion renders the five-day limitation prescribed in the statute wholly inapplicable thereto; and if the secretary erroneously rejected these names from the petitions for this measure, the advocates have the right to have them now restored thereto, to make up for any deficiencies which might have occurred by reason of the rightful rejection of names by the secretary.

We conclude that the secretary of state is without authority to inquire into or decide the question of the names upon the petitions being the "signatures of legal voters," in the light of the express provisions of the statute committing that question for decision to local certifying officers, and that when a local certifying officer has decided that names upon the petition are the signatures of legal voters, and has evidenced his decision by proper certificate in the manner provided by law, his decision is absolutely final so far as the power of the secretary of state to ignore or review the same is concerned.

It is contended that, even though the secretary of state is bound by the decision of the local certifying officers on the question of the names upon the petition being the signatures of legal voters, the superior court is not so bound, but may review the question upon appeal from the secretary. Viewing the proceeding in the superior court as, in substance, an appeal from the secretary's decision, as it may well be argued the statute contemplates, it is difficult indeed to see how it involves errors of either law or fact committed by any other officer than the secretary. Viewed in such light, it is quite clear that the proceeding would be to correct his rulings and decisions if erroneous, and not those of any other officer or officers. Treating the proceeding in the superior court as an original action therein, there might be furnished some ground for contending that the court's inquiry could extend beyond the questions to be decided by the secretary. In *In re Initiative Petition No. 23*, *supra*, the court seems to have entertained the view that the proceeding was in the nature of an original action, under a review statute similar to ours. We have already noticed, however, that this is a political question, purely so, in so far as questions of fact are involved, and that the courts have jurisdiction over it only in so far as statute or written constitutional law prescribes. The Oklahoma court was not confronted with an express statutory provision committing the decision of the question of the names upon the petitions being the "signatures of legal voters" to any special officer or class of officers. It was not confronted with any statutory provision providing for an official determination of such question by local administrative officers with no provision for review of their determination, as is provided for in this statute. But that court was reviewing, by express statutory authority, the decision of the secretary of state of Oklahoma upon matters including this very question, the court proceeding upon the theory that it was one of the questions within the secretary's power to decide under their statute. We think this court

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proceeding limits the court's inquiry to questions the secretary has power to decide, and his errors.

Some contention is made against the finality of the determination of the local certifying officers, rested upon the fact that there seems to be no special provision of the law requiring such officers to return their certificates to the secretary. We are of the opinion, however, that this does not change the fact that such local officers' decisions are their official acts and decisions, and that their certificates are the prescribed official evidence of their decisions. In this connection, some contention is also made against the finality of the decisions of the local certifying officers in nonregistration precincts. This apparently is rested upon the fact that the prescribed form of the certificate for such officer to make is that he "Is acquainted with the legal voters thereof [a precinct] and that he believes the signatures opposite which he has written his initials are the signatures of legal voters of such precinct." The argument seems to be that, because the decision of such local officer is expressed in the form of belief, its force and effect as an official decision is lessened. We are unable to agree with this view. In its last analysis, that is all that the decision of any court or tribunal amounts to. The official determination of a question by a court or tribunal is but the conclusion which he or it believes to be the correct one. In the vast majority of cases, it can of necessity amount to nothing more. We are of the opinion that the determinations made by local certifying officers, as prescribed by this law, have all the force and effect of official determinations of such officers, whether they relate to registration or nonregistration precincts.

The penal provisions of this law are very severe; set forth in detail and with manifestly great care. They are directed to the signers of petitions, the certifying local officers, and even those who circulate petitions soliciting signatures thereon for pay. So far as safeguarding the operation of a law by severe and painstaking prescribed penal provisions is con-

cerned, this law has been, we think it safe to say, seldom exceeded in this respect. Among other provisions therein we find, in §§ 31 and 32 (3 Rem. & Bal. Code, §§ 4971-31, 4971-32), the following:

"Every person who shall sign any initiative or referendum petition provided for in this act with any other than his true name shall be guilty of a *felony*. Every person who shall knowingly sign more than one of such petitions for the same measure or who shall sign any such petition knowing that he is not a legal voter or who shall make on any such petition any false statement as to his place of residence, and every registration officer who shall make any false report or certificate on any such petition shall be guilty of a *gross misdemeanor*. . . . every person . . . who shall for pay or any consideration, compensation, gratuity, reward or thing of value or promise thereof, circulate or solicit, procure or obtain or attempt to procure or obtain signatures upon any initiative or referendum petition; or who shall pay or offer or promise to pay, or give or offer or promise to give any consideration, compensation, gratuity, reward or thing of value to any person to induce him to sign or not to sign, or to circulate, or solicit, procure or attempt to procure or obtain signatures upon any initiative or referendum petition . . . shall be guilty of a *gross misdemeanor*."

Section 5 (3 Rem. & Bal. Code, § 4971-5), provides that warning as to these penalties be printed on every petition. Surely these provisions evidence an intent on the part of the legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people, except in so far as the legislature has provided for correction of erroneous rulings and decisions by officers having to do with the execution of the law. The question being inherently political, the legislature had the right, and evidently intended to provide, these penal provisions as the sole safeguards for the proper operation of the law, except wherein it has specifically provided other safeguards. The legislature might well have concluded that the possibility of fraud and wrong on the

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part of signers and local certifying officers, and the possibility of invalid signatures thereby getting upon the petitions, was not of such consequence as to call for other safeguards and sanction of the local certifying officers' decisions than these penal provisions of the law. Clearly the legislature was not required to go further, and we think it has not done so. We conclude, in view of these considerations, that the superior court had no power to review the determination of the local certifying officers upon the question of the names upon the petition being the signatures of legal voters, when so decided and evidenced by the certificates of such officers, as the law requires. The decisions we have above cited and reviewed we think lend all the support necessary to this conclusion.

A large number of names upon the petitions were initialed by the local certifying officers in common lead pencil instead of ink, as the statute in terms provides they shall be. These names were rejected by the secretary. Both judges of the superior court reversed the secretary upon this point, and counted the names so initialed. It is contended by counsel for the advocates of the measure that the law is only directory upon this subject, and that the initial by pencil by the certifying officers is a substantial compliance therewith; while counsel for the opponents of the measure contend to the contrary, and that these names should be rejected. The general rule of construction, determinative of whether any particular provision of the statute is mandatory or directory, is well stated in the text of 36 Cyc. 1158, as follows:

"A provision of course is mandatory which is declared by the statute itself to be so. When a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, the provision may generally be regarded as directory."

This law contains no provision declaring that the initialing by means other than ink renders a signature upon the petition so initialed invalid. In 2 Lewis' Sutherland's Statutory Construction (2d ed.), § 611, the learned author observes:

"There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words, and there are no negative words, and it relates to the time or manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory. Generally, it is so; but it is a question of intention. Where a statute is affirmative it does not necessarily imply that the mode or times mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental or comparatively unimportant particular."

In *Duncan v. Shenk*, 109 Ind. 26, 30, 9 N. E. 690, it is said:

"It is also a well recognized principle of statutory construction, that election laws are to be liberally construed when necessary to reach a substantially correct result, and to that end their provisions will, to every reasonable extent, be treated as directory rather than mandatory."

See, also, *McCrary*, Elections (4th ed.), 227; *Willeford v. State*, 43 Ark. 62; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39.

Our attention is called to our decisions in *State ex rel. Czerny v. Superior Court*, 70 Wash. 592, 127 Pac. 207, and *State ex rel. McCauley v. Gilliam*, ante p. 186, 142 Pac. 470. These decisions, however, deal with statutes which are

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in express terms in the particular involved declared to be mandatory. In the *Czerny* case, the statute expressly provided: "No signature shall be valid unless the above requirements are complied with." In the *McCauley* case, the statute expressly provided: "Until such statement is filed the officer shall refuse to receive such petition," referring to the required filing of a statement in connection with a recall petition. Of course, those provisions are mandatory, and a failure to do the things required by the express terms of the statute was fatal.

In *State ex rel. Waggoner v. Russell*, 34 Neb. 116, 51 N. W. 465, 33 Am. St. 625, 15 L. R. A. 740, there was involved the validity of a ballot marked by the voter with a cross in pencil, when the statute in terms provided that "the elector . . . shall prepare his ballot by marking in the appropriate margin or place a cross (X) with ink opposite the name of the candidate of his choice . . ." The statute contained no provision declaring a ballot so marked in pencil void. The court held the statute directory in this regard, and the marking of the ballot by pencil to be valid, entitling the voter to have it counted. The question is there ably reviewed at considerable length. The following decisions, relating to particular cases, support this view: *Montgomery v. Henry*, 144 Ala. 629, 39 South. 507, 1 L. R. A. (N. S.) 656, dealing with statutory required numbering of ballots in ink where ballots were left unnumbered; *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 405, 85 Am. St. 315, dealing with statutory required initialing of ballots where only one initial is used, the statute requiring the indorsement of election officials' "initials" thereon; *Truelsen v. Hugo*, 87 Minn. 139, 91 N. W. 434, dealing with statutory required initialing of ballots where they were left uninitialed by the election officers; *McClelland v. Erwin*, 16 Okl. 612, 86 Pac. 283, dealing with statutory required stamping of a cross by the elector upon his ballot to evidence his choice where he marked a cross with a pencil; *Slenker*

v. Engel, 250 Ill. 499, 95 N. E. 618, dealing with a ballot marked with a broken pencil or some similar instrument which left only an indentation mark of a cross upon the paper but no color. We conclude that the statute is directory to the extent that initialing in lead pencil is a substantial compliance therewith, and that the names upon the petition so initialed, when otherwise properly certified, should be counted.

Section 9 of the law (§ Rem. & Bal. Code, § 4971-9), provides that the petition shall consist of sheets "with numbered lines for not more than twenty signatures on each sheet." There is no other provision of the law touching the question of the manner of signing the petitions. A number of sheets in these petitions contained more than twenty names on them, resulting in names not being upon the numbered lines. Many names were rejected by the secretary because of this irregularity. The decision of the secretary upon this point was affirmed by Judge Claypool and reversed by Judge Mitchell. We think the provision of the law prescribing the form of petitions, in so far as it relates to the number of lines thereon, is directory, in so far as it may be considered as thus prescribing the number of signatures that must be upon the petition. What we have already said upon the question of directory statutory provision we think is decisive of this question in requiring these rejected names to be counted.

Names were rejected from a number of the petitions by the secretary because the local certifying officers initialed blank lines thereon where no petitioner's name appeared. The secretary seems to have proceeded upon the theory that this initialing of blank lines was of itself such conclusive evidence of fraud on the part of the certifying officer as warranted the rejection of all names upon petitions where the initialing of blank lines occurred, especially where such initialing occurred upon several blank lines. It is conceded that there was no other evidence of fraud touching these pe-

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titions. Judge Mitchell reversed the decision of the secretary upon this point, while Judge Claypool affirmed his decision. We are constrained to hold that the names upon such petitions which were duly initialed and certified should not be rejected because of this initialing of blank lines on such petitions. It is suggested that this involves a question of fact as to which the secretary's decision is conclusive, in the absence of fraud or manifest bad faith on his part, with which he is not charged here. On the contrary, his good faith and honesty of purpose in deciding all questions presented to him is freely conceded by all concerned. While we may concede that the decision of the secretary upon a question of fact, in the absence of fraud or bad faith on his part, is conclusive upon the courts, we are nevertheless of the opinion that the mere fact of excessive initialing as here shown must be held, as a matter of law, not of sufficient weight as evidence to warrant the conclusion that the initialed and certified names upon such petitions were fraudulently or illegally initialed by the local certifying officers. We conclude that these initialed names should be counted where otherwise properly certified by the local certifying officers.

Finally, we conclude that there should be restored to these initiative petitions, and treated as valid certified signatures of legal voters thereon, the names which have been erroneously rejected therefrom, belonging to the classes we have above noticed and discussed, to wit:

(1) Names rejected as being forged and fraudulently signed to petitions which are duly certified by the local certifying officers as the "signatures of legal voters."

(2) Names initialed in lead pencil by the local certifying officers and otherwise duly certified by them to be the "signatures of legal voters."

(3) All names on sheets of the petitions containing more than twenty names, some of the names not being on the lines, which names are properly initialed and otherwise duly cer-

tified by the local certifying officers to be the "signatures of legal voters."

(4) Names on petitions containing initialed blank lines, in so far as such names are duly initialed and otherwise properly certified by the local certifying officers to be the "signatures of legal voters."

The number of such signatures so rejected, when restored to the several petitions, will, in our opinion, result in making the number of valid signatures upon each of the following petitions for initiative measures in excess of the required 31,836, to wit:

(1) The petition for initiative measure No. 7, relating to the bureau of inspection.

(2) The petition for initiative measure No. 8, relating to employment agencies.

(3) The petition for initiative measure No. 9, relating to first aid to injured workmen.

(4) The petition for initiative measure No. 10, relating to public highways.

The number of the four classes of rejected signatures we have discussed, when restored to the petition for initiative measure No. 12, relating to the tax commission, will not, in our opinion, furnish that petition with sufficient valid signatures to make the total valid signatures thereon equal to the required 31,836. Our opinion touching the insufficiency of the petitions as to the number of signatures thereon for this measure is influenced to a considerable extent by the presumption which, of course, prevails in favor of the correctness of the decision of the secretary and the superior court. We may say that there is room for argument upon this question for and against the rejection of certain names originally upon this petition, other than those which our conclusions above set forth would restore thereto. As we are of the opinion that the decision we might arrive at touching the other questioned names upon this petition would not result in making the total of the names upon the petition equal the

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required \$1,836, we deem it unnecessary to further pursue our inquiry touching this petition, and the necessity of haste forbids that we take further time for discussion relative thereto.

Since our decision is to be given effect through direct communication thereof to the secretary of state, instead of through the usual remittitur to the superior court, *it is ordered* that the secretary of state submit to the voters, as required by law at the general election of the present year, initiative measures No. 7, relating to the bureau of inspection; No. 8, relating to employment agencies; No. 9, relating to first aid to injured workmen, and No. 10, relating to public highways. The clerk of this court is directed to notify the secretary of state of this decision, in compliance with the concluding language of § 17 of the law.

CROW, C. J., ELLIS, MOUNT, and FULLERTON, JJ., concur.

MAIN, J. (dissenting)—I am unable to concur with the view expressed in the majority opinion that the finding of the local certifying officer is final and conclusive and not subject to review. What may be the scope of the power of the secretary of state is not involved in these cases. The causes are here for review upon judgments of the superior court. When either the proponents or the opponents of a measure are dissatisfied with the action of the secretary of state, they may bring the matter before the superior court for a trial and determination. Upon this trial the court has the power to determine all questions of law and fact that may arise, the same as in any other action. The statute provides that, by certiorari, the judgment of the superior court may be reviewed by this court. To determine the questions presented upon the various measures which are involved would require a detailed examination of the record in each case. This would consume possibly a week's time and unnecessarily delay the decision, since the majority opinion would prevail in any event.

Gose, J. (dissenting)—The majority opinion is predicated upon what I conceive to be two fundamental errors. First, that the certificate of the certifying officer, if it substantially conforms to the requirements of the statute, has absolute verity and finality; and second, that neither the secretary of state nor the courts have the power to purge the petitions of fraudulent signatures.

Both the secretary of state and two trial judges, after an exhaustive and painstaking examination of the petitions (the latter aided by an expert in handwriting), have found that the petitions are honeycombed with fraudulent signatures. With these signatures eliminated, most of the petitions are short of the number required by the constitution to place them before the people, and yet the majority say, in effect, that a fraudulent petition is cleansed of its sins if properly certified, and that the people are without recourse other than to enforce the penal provisions of the statute. I cannot acquiesce in so monstrous a doctrine. In its last analysis, it means that one man can collude with a certifying officer, if he can find one sufficiently corrupt, write sufficient names upon the petition to satisfy the mandate of the constitution, have it certified, and that neither the secretary of state, who is charged with expending the public money in placing the measure before the people, nor the courts, may go behind the return and proclaim and condemn the fraud. It is a rule of universal application that an interpretation of a statute which leads to absurdities should be avoided. As was aptly said by Judge Claypool in an opinion filed in the court below, "People who propose to make new laws are not wronged by being required to observe the laws already in existence." Fraud in the initiation of a law to be submitted to the people is as ugly and unclean as fraud in a contract, and all courts hold that a contract conceived in fraud may be avoided by the party who has been defrauded. The parties who have been defrauded in the case at bar are the taxpayers from whom the money has been taken to place before the people an initia-

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tive measure which is short of the constitutional number to authorize it to be submitted, except by counting the fraudulent signatures.

Recurring to the constitutional amendment which authorizes the initiative and referendum (Laws 1911, p. 186, § 1, subd. a) we find that "ten per centum, and in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition." Subdivision d provides that "this section is self-executing, but legislation may be enacted especially to facilitate its operation." To facilitate its operation how? Obviously by requiring all petitions to be signed by the constitutional number of legal voters. The number of legal voters fixed by the constitution for placing an initiative measure before the people for adoption or rejection is an express limitation upon the power to legislate by the initiative.

The legislative branch of the government has appropriated \$300,000, or as much thereof as may be necessary, to be used by the secretary of state in paying the expenses of "clerk hire, postage, transportation and printing necessarily incurred in carrying out the provisions of the statutes with reference to the initiative and referendum and the recall of elective public officers of the state." Laws 1913, p. 417.

Laws 1913, p. 418, prescribes the method of initiating and submitting proposed measures to the people. Section 8 provides, among other things, that petitions for circulation in nonregistration districts may be certified by "justice of the peace, road supervisor, member of a school board or a postmaster, to the effect that he resides in the precinct, naming it, and is acquainted with the legal voters thereof and that *he believes* the signatures opposite which he has written his initials are the signatures of legal voters of such precinct." Section 11 provides that when the "signatures of legal voters" equal to the minimum number fixed by the constitution have been obtained, the petition may be submitted to the secretary of state for filing in his office. Section 12 provides that the secretary

of state, upon any such petition being submitted to him for filing, shall "examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters," shall "accept and file" the same if presented within the time limited by the statute. Section 13 provides for a review by the court if the secretary of state shall refuse to "file any such initiative or referendum petition when submitted to him for filing." It further provides that, upon final hearing, if the court shall determine that the petitions are "legal in form and apparently contain the requisite number of signatures, and were submitted for filing within the time prescribed in the constitution," it shall require the same to be filed by the secretary of state as of the date of its submission. It further provides that the decision of the superior court may be reviewed by this court upon a writ of certiorari, and that if the supreme court shall decide the petitions are "legal in form and apparently contain the requisite number of signatures of legal voters, and were filed within the time prescribed in the constitution" it shall require the secretary of state to file the petition. Section 15 provides that, after the petitions have been filed, the secretary of state shall forthwith, in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to "canvass and count the names of certified legal voters" on such petition; that if he finds the same name signed to more than one petition he shall reject both names from the count, and that if, at the conclusion of the "canvass and count," it shall appear that such petition bears the requisite number of names of "certified legal voters," the secretary shall cause the same to be submitted to the people in the method provided by the statute. Section 17 provides that any citizen who shall be dissatisfied with the determination of the secretary of state that the petition "contains or does not contain the requisite number of signatures of *legal voters*" may apply to the superior

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court of Thurston county for a citation requiring the secretary to submit the petitions to the court for examination. It further provides that the decision of the superior court may be reviewed by this court upon a writ of certiorari. We have italicized portions of the statute for the purpose of emphasizing the legislative intent.

When these several sections are read in the light of the constitutional mandate fixing the minimum number of signatures which shall authorize an initiative measure to go before the people, the view is compelling that the legislature intended to devolve upon the secretary of state the duty of expunging fraudulent signatures. Recurring to the provisions of § 8, it will be remembered that, in nonregistration districts, the officer named is only required to certify that he is acquainted with the legal voters of his precinct, "and that he believes the signatures" to be the signatures of legal voters of the precinct. It was apparent to the legislature that, in most instances, the certifying officer in such precincts could not know the signatures of one per cent of the electors residing in his precinct. In view of this fact, it seems preposterous to assume that the legislature intended to give finality to such a certificate. It may be said in passing, that most, if not all, the fraudulent signing occurred in non-registration precincts. If the majority view is correct, §§ 15 and 17 of the law, to which I have adverted, accomplish no practical purpose. If the legislature had intended what the majority say it intended, it would have provided that the secretary of state should, upon the presentation of the petitions, examine them, first, to see that they had the requisite number of signatures, second, to see that they were certified in substantial conformity with the statute, and third, for duplications, and if, after eliminating the duplicate signatures, there remained enough names properly certified to meet the mandate of the constitution, he would have been required to file the petitions and take the requisite steps to submit the measures to the people. With the ma-

jority view, it was useless for the legislature to require two counts and to provide for two reviews by the court. It seems to the writer that the purpose of the legislature is apparent. In the first instance, before the filing, the secretary of state was merely required to make a cursory examination to ascertain if the petition appeared to be in proper form and appeared to bear the requisite number of signatures of legal voters. If it did, it was his duty to file the petitions. In such case, if he refused to file the petitions, the court, upon proper application, simply determined whether the petitions were legal in form and apparently contained the requisite number of signatures. I adopt the view of the majority as to the meaning of the word "canvass;" that is, that it means to "scrutinize, examine, determine" whether the petition contains the requisite number of *legal* voters regularly authenticated; not as the majority assume, the number of "*certified legal* voters," so authenticated. If this interpretation is not sound, why did the legislature change from the words "appear to be in proper form and bear the requisite number of signatures" in § 8 to the words "canvass and count" in § 15? I think the legislature intended, in the light of the constitution and the statute as a whole, to require the secretary of state to determine whether the petitions were signed by the requisite number of legal voters, which carried with it the power, not only to expunge duplicate signatures, but fraudulent signatures as well.

This view is in harmony with the decisions of this court as I read them. I think the majority have misconstrued our decisions in county seat and other like cases. In *Mann v. Wright*, *ante* p. 358, 142 Pac. 697, a county seat case, we said:

"It will appear from a reference to these cases that we have held the submission of a proposition to change a county seat to be a political or a public question; that, in the absence of a statute giving the courts jurisdiction of such matters, the courts will not interfere with the determination of

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the board of county commissioners where the order of submission is fair upon its face, except in cases of fraud or arbitrary action such as was present in the *Rickey* and *Krieschel* cases."

In *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183, relied upon in the majority opinion, this court said, in reference to the duty of canvassing boards:

"That the duty of canvassing boards is purely ministerial and confined to tabulating and ascertaining the result of an election as shown by the face of the returns properly made out by the election officers is well established upon both reason and authority."

These petitions were not fair upon their face. A most casual inspection will show that in many instances one person signed two or more names. This is not only apparent from an inspection, but the fact that names were so signed was shown by the expert witness in the court below, and not met by the adverse party.

In *State ex rel. Chealander v. Carroll*, 57 Wash. 202, 106 Pac. 748, the relator filed in the office of the city comptroller a written declaration of his candidacy for a public office, in harmony with the direct primary law. The comptroller refused to recognize him as a candidate, or to cause his name to be placed on the ballot. The relator sought to compel the comptroller by mandamus to place his name on the ballot. There was no statute or charter provisions authorizing the comptroller to inquire into the eligibility of a candidate for public office who had filed his declaration of candidacy. The primary law limited the right to file a declaration of candidacy to those persons "who shall be eligible," to the office sought. After advertng to the fact that the comptroller was charged with the expenditure of public money, we held that he had a right to inquire into the eligibility of a candidate, and that where the act to be performed involved, as it did there, the expenditure of public money, his duty to inquire had "almost the form of a mandate."

The findings of the secretary of state, an administrative officer, upon questions of fact are final except for fraud, and no fraud or arbitrary action is claimed. Indeed, it is admitted that the secretary acted in the utmost good faith. *Simmes v. Daggett*, 80 Wash. 673, 142 Pac. 5; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912 B. 870; *Blumauer v. Mann*, 72 Wash. 429, 130 Pac. 491.

We have uniformly held that a public officer will not be compelled to do an illegal act. *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741; *State ex rel. Baker River & S. R. Co. v. Nichols*, 51 Wash. 619, 99 Pac. 876; *State ex rel. Socialist Labor Party v. Nichols*, 51 Wash. 79, 97 Pac. 1087.

In *State ex rel. Hill v. Olcott*, 67 Ore. 214, 135 Pac. 95, 902, a referendum case, the court emphasized the fact that no attack was made upon the genuineness of any signatures. In holding that the statute put the duty upon the secretary of state to determine whether the signatures were genuine and regularly authenticated, the court said that, in view of the fact that the genuineness of the signatures was not questioned, the secretary of state was justified in filing the petition, and that it was "much influenced in this conclusion by the fact that it is the duty of the defendant (the secretary of state) in his official capacity, to determine in the first instance by an inspection of the petition whether the signatures are genuine and are regularly authenticated." A like principle was announced in *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 689. In *In re Initiative Petition No. 23*, 35 Okl. 49, 127 Pac. 862, it was held that such petitions are presumptively valid, and that this presumption can only be overthrown by proof of fraudulent, arbitrary, or other unlawful conduct in securing signatures. We are in hearty accord with this view. The petitions came before the secretary of state presumptively valid, but the law put the

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duty upon him to ascertain, in so far as he could, whether the signatures were genuine, and whether they were certified in substantial conformity with the statute.

I cannot agree with the majority in its view that § 17 of the act limits the trial court and this court to a review of the errors committed by the secretary of state. It seems to me that this view entirely overlooks the language of this section. At the expense of repetition, I again quote its provisions:

“Any citizen who shall be dissatisfied with the determination of the secretary of state that the petition contains or does not contain the requisite number of signatures of legal voters may . . . apply to the superior court of Thurston county . . . for a writ of mandate compelling the certification of the measure and petitions . . . which application . . . and all proceedings had thereunder, shall take precedence over other cases, and shall be speedily heard and determined.”

The inquiry is, What shall be speedily heard and determined? The answer is found in the statute itself; that is, whether the petition “contains or does not contain the requisite number of signatures of legal voters.” My view is that the superior court is bound by the decision of the secretary of state on questions of fact, in the absence of fraud, to the same extent that it is bound by the findings of the public service commission, by the board of equalization, or by any other quasi judicial or administrative officer. If this view is not correct, then the superior court proceeds *de novo*, as was held in the Oklahoma case, and may determine the facts as in any other case. The superior court is a court of general jurisdiction, and when it takes cognizance of a case it takes it for disposition conformably to the statutes of the state and the general law. If it be a sound interpretation of the statute that the words “certified legal voters” mean all names certified to be legal, then it follows that the legislature had a purpose in omitting the word “certified” in § 17, and that purpose was to put the duty upon the superior court to determine whether

a given petition in fact contained the requisite number of signatures of "legal voters."

I find no evidence in the statute of an intention to give finality to the certificate of the certifying officers. If the statute is reasonably susceptible of that interpretation, then, in my opinion, it would clearly be unconstitutional, because a dissatisfied citizen, at some time and some place, has the constitutional right to have it determined whether the petition contains the requisite number of names of legal voters as fixed by the constitution before the initiative measure may be submitted to the people.

In conclusion, I think, first, that the certificate of the certifying officer only presumptively gives validity to the signatures; second, that it was the duty of the secretary to purge the petitions of all fraudulent signatures; third, that his findings upon questions of fact, in the absence of fraud or arbitrary action, are conclusive; fourth, that if this interpretation be unsound, the statute in terms confers this power upon the superior court of Thurston county; and fifth, that, if it did not, the superior court of Thurston county, being a court of general jurisdiction, when it took cognizance of the case, had the power to take evidence upon the question of fraudulent signatures, and expunge from the petitions all signatures which it found to be fraudulent.

For these reasons, with great respect to the opinion of the majority, I dissent.

CHADWICK, J. (dissenting).—When I was called upon to sit in this case, I had not read the briefs, and I felt that it would not be right to take time to study the statutes and the opinion at the time it came to me, inasmuch as the majority had signed it. Accordingly I said:

"It is imperative that the opinion in this case be filed this afternoon. I did not sit with the judges who heard the cases in the first instance. A majority has signed the opinion and it would do no good for me to hold it until I can give the case the attention it requires. As soon as it is possible for me to

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do so, I will go into the case as thoroughly as I can and will then express that opinion which in my judgment governs the cases."

I have made some examination of the law and of the record, and it is my judgment that the statute makes the secretary of state the canvassing officer, with power to inquire and to determine whether the petitions have been signed by a requisite number of legal voters; that, in the absence of any challenge, his certificate is final; but if challenged, his judgment is subject to review by the superior court; that the superior court has power to inquire *de novo* and to make findings.

It seems to me that Judge Gose's analysis of the statute is unanswerable, but I rather agree with the second ("fourth" and "fifth") of his alternatives, which, as I understand, is in accord with Judge Main's opinion.

It would serve no purpose to review the statute or the decisions relied upon, and I shall not do so except to say that the decisions of this court, known as the county seat cases, are, in my judgment, not in point, for this reason: in those cases, the act sustained was the act of a tribunal established by law and working under the sanction of an oath, an oath to maintain the constitution and laws of the state of Washington. The county commissioners were, in a sense, a canvassing board, whereas the person who certifies the petitions in nonregistration districts under the initiative law is not an officer of the state of Washington and his declaration of opinion should be no more final than the certificate of the judges and inspectors at a general election. There is nothing other than his declaration to give credence to his certificate. He has taken no oath binding him to observe the law he is called upon to execute. Any other construction leaves the provision requiring a canvass of the vote without any life or meaning.

The effect of the decision of the majority is that fraud can stalk rampant through the courts, which are established to maintain justice. I am unwilling to hold any such doc-

trine. The legislature was careful to say that no less than a certain number of valid signatures should be on the petition. It was not the intent of the people, when the constitutional amendment was adopted, that any other rule should prevail. We are not passing on the merit of the proposed laws. The fraud in these cases is not denied. The forgeries are so numerous and so glaring and they speak so loudly that no man would have the hardihood to deny their existence. The good faith and findings of the secretary and the court are not questioned. It is not insisted that the petitions contain a sufficient number of legal signatures. Proponents admit all these things, but they say, and the court finds, that the law is helpless; that, inasmuch as the petitions are in form sufficient, we cannot inquire into their substance. I do not believe that the law is helpless. The legislature has not legalized fraud and perjury and forgery, and courts should not do so.

The rule relied upon by the majority is sound but I believe it is misapplied. It does not fit into the four corners of this case. It is a rule arbitrary in its nature, and was adopted by the courts to do justice and not to work injustice; to preserve harmony between the several departments of government. It is a rule which prevents a court from inquiring into the motives and discretion of officers when collaterally attacked, when charged with the execution of the powers of other coordinate branches of the government. It is never applied where the law provides for a direct attack, as I believe it has in this case.

The distinction between the rule adopted by the majority and the applicable rule was observed by this court in the case of *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480. The court there said:

"The granting of the writ in this case did not involve an inquiry into any matter which rested in the discretion of the board, nor into any disputed question of fact. It was not an interference with the legislative branch of the govern-

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ment in any sense, but rather was in aid of legislative action. The legislature only authorized the board to submit the question in case the petition specified was filed, and then the board *must* submit it. If the board should arbitrarily refuse to act where, under the undisputed facts the law required them to proceed, the courts would unquestionably compel them to act. No other branch of the government could compel action, and if the courts have not jurisdiction in such a case the legislature is powerless and the law simply a dead letter."

The converse of this must follow. That is, where the law says that the question shall be submitted only upon a petition containing a sufficient number of legal signatures, and the fact is admitted that there is not a sufficient number of legal signatures, the court should restrain the proceeding. If it is not so, then indeed is the legislature powerless to preserve the sanctity of such proceedings and the law is a dead letter.

If a man forges a signature to a check or to a note, it has no legal life for it is conceived in fraud. If this court should hold that such a note or check were good if it had the certificate of a confederate that he believed it to be the signature of the party whose name was attached to it, we would meet the just criticism of all men. I can see no difference between such a case and the one at bar except that the case at bar may have less to excuse the fraud. Those who circulate and certify these petitions are voluntary agents acting under a deep moral obligation to the state. They are exercising in the highest degree a public function. If they return forged petitions, no pecuniary gain results to them, but the state suffers a loss in the lowering of its moral standards.

With the fact admitted that the petitions do not contain a sufficient number of legal signatures, it seems to me that the court has made a mistake in searching for precedent and authority to sustain them. The initiation of laws by petition is a new thing. It stands unrelated to any other sub-

ject of the law's concern, and instead of looking for authority that has been applied to cases where courts have said they would not review the discretion of public officers, we have a rare opportunity to say that, with the adoption of new ideas, we will declare a rule founded in the doctrine of common honesty regardless of precedent. If there be no authority or precedent for holding tight to the doctrine of honesty in all public affairs, then I say, as I have said twice before (*Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213; *Weber v. Doust*, *post* p. 668, 143 Pac. 148), it is high time that we make a precedent.

There is only one test and that is, an honest petition containing a sufficient number of legally qualified voters. Can any one doubt what the attitude of proponents would be if they were opposing, rather than promoting, these measures? If the other side were here with a petition reeking and dripping with fraud, would they not insist that the parties who certified the fraud could not purify it so as to pass the inspection of canvassing officers and of the courts? Will proponents deny that they would be here asserting that the measure proposed be sustained by reference to the doctrine of common honesty and that the name of every petitioner should be the truthful expression of every one who signed it? It may be admitted that there are thousands of names of good honest men on the petitions, but that is not enough. The people themselves have fixed a certain limit of ten per cent of the legal voters; and before the petition can be voted on, it should have the requisite number of legal signatures. To hold the contrary, is to nullify the limit fixed by the people. If this procedure is upheld, we would have to allow a petition actually signed by one or one hundred men, if there were a sufficient number of fraudulent names to make up the number required and these certified in form.

Something was said in oral argument about progressive measures. To sustain fraud and forgery is not a proper test of progress. Progress stands for honesty. To take a

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petition acknowledged to be fraudulent by counsel and by every member of this court and purify it by judicial breath is retrogression in its worst form. The people are demanding that the courts shall look to the justice of the case and abstain from technical constructions. It is my opinion that no case has ever been before this or any other court where justice has been so clouded by a technicality.

I have no fault to find with my brothers who have signed the majority opinion. They are as sincere in their opinion as I am in mine. I believe they have misconceived and misapplied the law.

I have written my opinion of the proceedings attending the preparation and filing of the petitions in these cases so that when the legislature is convened it will know that it has been judicially held that certified fraud is legal fraud; that its former act has no gates to shut out frauds and forgeries and that the citadel of truth and honesty that it undertook to build around the constitutional amendment permitting and encouraging direct legislation is a house of cards.

[No. 11382. Department One. September 22, 1914.]

ELIZABETH WEBER, *Respondent*, v. WILLIAM DOUST *et al.*,
Appellants.¹

CONSTITUTIONAL LAW—DUE PROCESS—DELINQUENT CHILDREN—UNLAWFUL DETENTION—LIABILITY OF OFFICERS. Officers who took into custody and detained a minor suspected of being a delinquent, before an attempt was made to comply with the provisions of Rem. & Bal. Code, § 1991, providing for the bringing of delinquent or neglected children before the juvenile court by first filing an information or complaint and the issuance of a summons, are liable in an action for false imprisonment, the detention being a violation of Const., art. 1, § 3, prohibiting the deprivation of liberty without due process of law.

FALSE IMPRISONMENT—ACTIONS—EVIDENCE. In an action for false imprisonment, the exclusion of evidence offered to show the details of an investigation relative to the death of plaintiff's sister was proper, where the court ruled that it would admit any evidence tending to show honest belief of defendants that they had the right to arrest plaintiff, or were advised by an officer to do so, and gave wide latitude in admitting any evidence which would show reasons or motive on the part of defendants in taking into custody and detaining plaintiff.

MUNICIPAL CORPORATIONS—OFFICERS—BONDS—LIABILITY OF SURETY. Sureties upon the official bonds of police officers are liable for the unlawful arrest of a minor, where the officers, acting in their official capacity, attempted to perform an official act in the line of their official duties, but in excess of their authority.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 12, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for false imprisonment. Affirmed.

H. M. Stephens and *W. E. Richardson*, for appellants.

Geo. W. Shaefer, for respondent.

MAIN, J.—The purpose of this action was to recover damages alleged to be due on account of false imprisonment.

¹Reported in 143 Pac. 148.

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The cause was tried to the court sitting with a jury. A verdict was returned in favor of the plaintiff in the sum of \$1,250, upon which a judgment was entered. The defendants have appealed.

The facts, so far as necessary to an understanding of the questions which are decisive of the action, are substantially as follows: The defendants against whom the judgment was entered were William J. Doust, chief of police of the city of Spokane; the American Bonding Company, as surety upon his official bond; Paul L. Buchholz and Cecil T. Thompson, police officers of the city of Spokane.

During the month of December, 1911, and for sometime prior thereto, the plaintiff and the other members of her family lived on a low flat in the bend of the Spokane river, in the western part of the city of Spokane. In order to go to other parts of the city or elsewhere, the members of this family either had to follow a path to the top of a considerable hill, or go by way of a wagon road which detoured somewhat. Near the top of the hill, the path and the road intersected. At this time, the Weber family consisted of the father, mother, one son, and two daughters, Anna and Elizabeth. On the morning of December 8th, 1911, the dead body of Anna was found; it lay across the path leading from the Weber home to the top of the hill. Some time during the previous night she had been murdered. Members of the family were suspected of knowing more about the matter than they were telling. The plaintiff, on or about the 10th of the same month, went to the office of the chief of police, where she was interrogated by the officers in charge, relative to the various members of her family and their relations to the deceased. The investigation of the police officers continued, and they talked with other members of the family, and further with the plaintiff.

The plaintiff was employed in the telephone office. On the afternoon of December 26, 1911, when she left her work about 4:30 o'clock p. m., she met, upon the street near the

building, police officers Buchholz and Thompson, who apparently had been waiting across the street until her work for the day was over. Officer Buchholz said to her that there was a lady on the north side who wanted to see her about the sister. The plaintiff then accompanied the two officers, and she was taken to the juvenile detention rooms, across the street from the Spokane county court house, and placed in the custody of Mrs. Rihard, a juvenile probation officer appointed by the judge of the juvenile court. She was there detained for a period of forty-eight hours, and was interrogated by Mrs. Rihard relative to her home conditions and the facts and circumstances surrounding the murder of her sister. There is no claim that the officers or Mrs. Rihard treated the plaintiff in any other than a kindly manner. The reason given by the officers for taking into custody and detaining the plaintiff was that her home conditions made it an unsuitable place for her, and if she were permitted to remain there, would contribute to her delinquency. At this time no complaint had been filed charging the plaintiff with being a juvenile delinquent. On the following morning, it appears that a complaint in some form was prepared and filed in the juvenile court, but the plaintiff was never brought before the court. After she had been in custody at the juvenile detention station for the period mentioned, on the advice of the prosecuting attorney, she was discharged and returned to her home. On June 8, 1912, the complaint in the present action was filed. The trial court instructed that the appellants were liable, and submitted to the jury the question of the amount of damages.

The paramount question here for determination is whether a child, thought to be a juvenile delinquent, may be taken into custody against his or her will and detained without a complaint being filed and the procedure followed as outlined in the law relative to delinquent children and juvenile courts.

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Article 1, § 3, of the state constitution provides:

"No person shall be deprived of life, liberty, or property without due process of law."

Rem. & Bal. Code, § 1987 (P. C. 69 § 11), defines who is to be considered a delinquent or neglected child. Section 1991 (P. C. 69 § 19), provides the procedure which shall be followed for the bringing of such a child before the juvenile court, and is as follows:

"Upon the filing of an information or the complaint the clerk of the court shall issue a summons requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, which time shall not be less than twenty-four hours after service. The parents of the child, if living, and their residence is known, or its legal guardian, if there be one, or if there is neither parent nor guardian, or if his or her residence is not known, then some relative, if there be one, and his residence is known, shall be notified of the proceedings; and in any case the judge shall appoint some suitable person or association to act in behalf of the child. If the person summoned, as herein provided, shall fail without reasonable cause to appear and abide the order of the court, or to bring the child, he shall be proceeded against as for contempt of court. In case the summons cannot be served, or the parties served fail to obey the same, and in any case when it shall be made to appear to the court that said summons will be ineffectual a warrant may issue on the order of the court, either against the parent or guardian, or the person having custody of the child, or with whom the child may be, or against the child itself. On return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner. Pending the final disposition of the case, the child may be retained in the possession of the person having charge of the same, or may be kept in some suitable place provided by the city or county authorities, or by any association having for one of its objects the care of delinquent and neglected children."

The section of the constitution quoted provides that no person shall be deprived of liberty "without due process of

law." The legislature, in the section of the statute set out, defined what would constitute due process of law for the purpose of taking into custody by the proper officers a delinquent or neglected child. From this section of the statute it will be observed that the procedure outlined for the bringing of a delinquent child before the juvenile court is the filing of an information or complaint, and the issuing of a summons requiring the person having the custody and control of the child to appear with such child at the place stated in the summons. It is also therein provided that, in case it shall be made to appear to the court that the summons will be ineffectual, a warrant may issue upon the order of the court, either against the parent or the person having the custody of the child, or against the child itself.

In the present case, the respondent was taken into custody and detained without any attempt to comply with the statute. It seems very plain that a person who is claimed to be a juvenile delinquent cannot be taken into custody against his will and deprived of his liberty without any attempt to follow the statutory procedure, and entirely disregarding the constitutional requirement prohibiting the deprivation of liberty without due process of law. But it is argued in the brief of appellants that the procedure in the case of juvenile delinquents is equitable or civil, and not criminal. This position is supported by the authorities, and may be admitted without further discussion. It may also be admitted that a juvenile delinquent is not a criminal, but is a ward of the state, and the purpose of the legislation dealing with such children is not penal, but reformatory. Granting all this, it yet would not authorize or justify the depriving a delinquent child of its liberty without due process of law. As already stated in this case, the due process of law, as defined by the statute, was not followed. Neither was there any attempt to conform thereto. Whether the legislature has the power to authorize an officer or other proper person to detain a child without other formality

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than that such officer or other person has a suspicion or reasonable ground for belief that such child is a delinquent or neglected, is a question not now before us, as the procedure has not been thus defined.

The appellants sought to show upon the trial the details of the investigation which was made relative to the death of Anna Weber. This was excluded by the trial court. But the court expressly ruled that it would admit any evidence tending to show the honest belief of the appellants that they had the right to make the arrest, or that they were advised by any officer to do so, and the attendant circumstances. The court, in applying the ruling, gave reasonably wide latitude in admitting any evidence which would throw light upon the reasons or motive of the appellants in taking into custody and detaining respondent. The ruling of the court was plainly right.

The appellants also claim that the surety is not liable in any event. This contention cannot be sustained. The complaint alleges, and the evidence shows, that all the appellants, in what they did relative to the taking into custody and detaining the respondent, acted in their official capacities, and were attempting to perform an official act in the general line of their respective official duties, but that they acted in excess of their authority. *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12; *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001. In the case last cited, it is said:

"The averment in the petition that, in making the arrest he was acting under color of his office, is not the equivalent of an allegation charging him with acting in an official capacity as constable in making the arrest. The most serious objection to this allegation is that it simply states the conclusion of the pleader. It should state the authority by which Landrum was acting, so that the court, in construing the pleadings, may determine that a cause of action is stated against the sureties."

The judgment will be affirmed.

ELLIS and GOSE, JJ., concur.

CHADWICK, J. (dissenting).—The record reveals this state of facts: the individual defendants ascertained, while investigating an independent crime, that there was reason to believe that plaintiff was living under unwholesome moral conditions; that the murdered sister had for a long time sustained illicit sexual relations with her father and her brother. These facts were communicated to the prosecuting attorney, and he advised the detention of the plaintiff under the juvenile delinquent law. These facts were set up by the defendants in their answer. No complaint had been filed at the time plaintiff was detained, nor was one filed for at least a day thereafter. Further investigation warranted the prosecuting attorney in directing the discharge of the plaintiff without a formal hearing. The case has proceeded upon the theory that no person shall be held without due process of law, or be subject to restraint under the statute without a complaint filed and warrant issued.

It is my judgment that the juvenile probation act should not be regarded as a criminal statute. If it is so regarded, great injustice will come to those it was designed to serve and protect, and an unreasonable jeopardy will be put upon the administrative officers of the law. The purpose of the act is humane and equitable. It sounds in charity and benevolence. It is provided:

“This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be provided by its parents, and that as far as practicable any neglected or delinquent child shall be treated not as a criminal, but as misdirected and misguided, and needing aid, encouragement, help and assistance.” Rem. & Bal. Code, § 2001 (P. C. 69 § 37).

This being so, it should not be held that an officer, in the conscientious discharge of his duty, cannot detain for a reasonable time a juvenile who is suspected of incorrigibility or delinquency. The whole purpose of the law is to lead the

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child from evil ways and to shield him from the aspersions of public opinion; to remove him from improper environment; to prevent in after years the handicaps that attend notoriety or the knowledge that he has been charged with an offense against the law. The statute, if it is to be of any service to the public, demands that a child shall be protected, and as little publicity be given its offenses as possible. The spirit of the act is spoken in its every line, and if it is to follow that a child cannot be detained in any case without an information or complaint first being filed, it reveals a most glaring omission of the law, for how can a child be protected if the law demands that it be published to the world as a delinquent or an incorrigible? I think the section quoted by the majority should receive a more reasonable and a broader interpretation. It would be proper to say that no child shall be *committed* without a complaint and warrant. Section 2001 goes no further than this. It is silent as to detention pending an investigation. It will defeat the law entirely to say that a child cannot be detained for a time under proper, wholesome and helpful surroundings, such as were afforded in this case, and innocent and unoffending children, and those who are simply mischievous, will be submitted to the stigma which attaches to criminal suspects.

The majority has, in my judgment, failed to comprehend the true spirit of this special statute. The legislature has not only charged us with the duty of giving the act the broadest and most humane construction, but it has declared all delinquent and neglected children wards of the state and subject to the custody, care, guardianship and control of the court. It has provided for the appointment of probation officers, and has empowered them to make investigations and to take charge of the child before and after trial, as may be directed by the court. It has provided that no child under the age of fourteen years shall be confined in any jail, lock-up, or police station, and that they shall not come in contact with adult criminals; it has provided that all

counties of the first and second class shall provide detention rooms or houses of detention, to be overseen by matrons of good character.

In the case of *Lovell v. House of The Good Shepherd*, 14 Wash. 211, 44 Pac. 253, this court sensed the true spirit of the law when it denied a recovery in a case where the child had been detained by the House of The Good Shepherd and was thereafter released under habeas corpus proceedings. Juvenile delinquency laws have been considered by many courts, and they have never, so far as we are informed, been treated as criminal statutes. In *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, the court found, after a review of many authorities, that, considering the purpose of the law, there could be no constitutional question raised against it. If this is so, the premise of the majority, that is, that "no person shall be deprived of life, liberty or property without due process of law," is a false premise. Indeed, that constitutional provision can only apply in the event that we treat the juvenile law as a criminal statute. The following cases hold that juvenile laws are not criminal statutes, and some of them that a detention under them is not an arrest or imprisonment in violation of the due process clause of the constitution: *In re Powell*, 6 Okl. Crim. 495, 120 Pac. 1022; *In re Watson*, 157 N. C. 340, 72 S. E. 1049; *Ex Parte Ah Peen*, 51 Cal. 280; *Reynolds v. Howe*, 51 Conn. 472; *In re Sharp*, 15 Idaho 120, 96 Pac. 563; *State ex rel. Caillouet v. Marmouget*, 111 La. 225, 35 South. 529; *Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. 935; *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914 A. 1222, 45 L. R. A. (N. S.) 908.

The theory of these cases, and as all cases which appreciate and meet the full intendment of the law must be, is that the state stands in *parens patriae* to the child, and that its officers—for the state has no other way of acting—shall not be held to a criminal accountability, or to answer

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in damages sounding in tort, for a mistake of judgment in the administration of the law.

The defendants asked instructions upon the theory that the act was equitable and remedial and that an exercise of authority under it, in good faith, would excuse the officers. These were refused by the court. It is my judgment that they should have been given, and that a new trial should be had in any event. But admitting that the plaintiff is entitled to recover a verdict at all, I think that she should be allowed no more than a nominal sum. The court is unwilling to reduce the verdict in this case, because no error is assigned in this court on the refusal of the trial judge to either set aside the verdict or pass upon the motion for a new trial on the ground of excessive damages.

I have found no cases holding that the court can, of its own motion, reduce a verdict to a nominal sum where there has been not only no purpose to violate the law, but, on the contrary, the ones charged have proceeded in utmost good faith to serve the law, and I can only say, as I have said once before, that if there is no authority, it is high time that there should be. The law has to start somewhere, and I regard this as a rare opportunity to lay down a simple rule that will offend against no statute and do no violence to the public conscience, that where a public officer, without warrant, detains a child suspected of delinquency, but has done so in good faith, with no purpose other than to serve the ends of justice, and where the detention has not been for an unreasonable time, he shall not be held for other than nominal damages. The law being declared by the majority to be otherwise, it should be amended at the coming session of the legislature.

Crow, C. J., concurs with CHADWICK, J.

[No. 11657. Department Two. September 22, 1914.]

BOUTON-PERKINS LUMBER COMPANY, *Respondent*, v.

FRANK L. HUSTON *et al.*, *Appellants*.¹

TRIAL—NONSUIT—WAIVER OF MOTION. A motion for nonsuit is waived where defendants did not stand upon their motion, but introduced further evidence.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for damages for negligently permitting a fire, started by a donkey engine, to spread to plaintiff's sawmill, the giving of an instruction in accordance with Rem. & Bal. Code, § 5284, that it was unlawful during the closed season for any person who shall start a fire in any manner upon forest lands not his own to leave the same unquenched, is not prejudicial error in that the jury were, in effect, told that it would be unlawful to start a fire in any manner and leave it unquenched, even though started without negligence and for a lawful purpose, and though there was no negligence in failing to quench it, where, taken in connection with other instructions, the jury clearly understood that recovery could only be predicated on defendant's negligence in starting or in failing to quench the fire.

NEW TRIAL—GROUNDS—MISCONDUCT OF JURY. A new trial will be granted for misconduct of the jury, in an action for damages for negligently permitting a fire started by a donkey engine to spread to plaintiff's sawmill, where it appears that the jury, after agreeing upon a verdict for plaintiff, but before arriving at the amount of damages to be awarded, read and discussed a pamphlet purporting to contain the forest protection laws of the state, it not being shown that defendants were connected in any way with the misconduct; since, under Rem. & Bal. Code, §§ 342, 343, the jury are the judges of the facts alone, while it is the duty of the court to decide all questions of law.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered May 15, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Miller, Crass & Wilkinson, for appellants.

Ralph A. Coan, and *McMaster, Hall & Drowley*, for respondents.

¹Reported in 143 Pac. 146.

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Opinion Per Crow, C. J.

Crow, C. J.—Plaintiff was the owner of a sawmill located on what is known as Bell mountain, in Clarke county, together with machinery and equipment for its operation. On August 24, 1910, plaintiff's property was destroyed by a fire started by defendants, who, on August 11, 1910, were moving a donkey engine by its own power. It is alleged that the engine was not equipped with a suitable spark arrester, and that, by reason thereof, a fire was started, which defendants negligently permitted to spread. A verdict was rendered in plaintiff's favor, upon which judgment was entered. The defendants have appealed.

Appellants contend that the trial court erred in denying their motion for a nonsuit. They did not stand upon their motion, but introduced further evidence. An examination of the entire record convinces us that the case was rightfully submitted to the jury.

Error is assigned on the 15th instruction, which reads as follows:

"You are instructed that by the laws of the state of Washington it is unlawful during the closed season, from the first day of June to the first day of October in each year, for any person who shall start a fire in any manner upon forest lands, not his own, to leave same unquenched."

There is no contention that the alleged fire, which was started upon forest lands not belonging to appellants, was purposely started by them. On the contrary, the alleged starting of the fire is conceded to have been unintentional and accidental, even though it may have been caused by appellant's negligence. Appellants argue that the instruction is erroneous and prejudicial for the reason that, in giving it, the trial judge, in substance and effect, told the jury that if appellants started the fire, either intentionally or accidentally, with or without negligence, or in any manner whatever, and failed to quench it, they would be liable for resulting damages, even though with diligence and vigor they made every possible and reasonable effort to quench it. In giving

this instruction, we assume the trial judge had in mind a portion of Rem. & Bal. Code, § 5284, which reads as follows:

"During the closed season any person who shall kindle a fire on land not his own in or dangerously near any forest and leave same unquenched or who shall be a party thereto, or who shall by throwing away any lighted cigar, matches or by use of firearms or in any other manner start a fire upon forest lands not his own and leaves same unquenched shall upon conviction be fined not less than ten dollars nor more than one hundred dollars or be imprisoned in the county jail not exceeding two months."

There seems to be some room for appellants' criticism of this instruction. Standing alone, it might possibly be construed as imposing a greater liability than the statute warrants, as it in effect tells the jury that it would be unlawful for a person to start a fire in any manner and leave it unquenched, even though the fire may have been started without negligence and for a lawful purpose, and the party may have been guilty of no negligence in failing to quench it. In the light, however, of other instructions, by which it was made to clearly appear that respondents could only predicate a recovery on appellants' negligence in starting or in failing to quench the fire, we are constrained to hold that the giving of the instruction was not prejudicial.

In support of their motion for a new trial, appellants introduced affidavits of several jurors which disclosed the fact that, while the jurors were deliberating upon their verdict, one of them produced a pamphlet which purported to contain the forest protection laws of this state, and that portions of the pamphlet were read and commented upon. These affidavits were controverted, but the conceded facts are that the pamphlet was produced in the jury room after eleven of the jurors had agreed to return a verdict for respondent, but before they had completed their deliberations as to the amount of damages to be awarded, and that the pamphlet was read and openly discussed by some of the jurors. The affidavits are conflicting on the question whether the pamphlet in-

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fluenced some of the jurors in reaching their verdict. The pamphlet, as stated, purported to contain the forest protection laws of this state for the year 1911, and it appeared that a portion of the laws therein contained were not in force at the time of the fire, but were enacted at a later date. As an illustration of such later enactments, the following section, which appeared in the pamphlet, may be noted:

"Everyone operating a locomotive during the closed season shall have a man whose duty shall be to follow each logging locomotive, except a locomotive using oil for fuel, for the purpose of acting as fire patrol, the said man to begin the said patrol at approximately thirty minutes after the starting of the logging locomotive, which it is his duty to follow."

Then follows the penalty attached for the failure to comply with this section.

It appears from the affidavits that this particular section was read and commented upon during the deliberations of the jury as to the amount of damages. Another section appearing in the pamphlet provides that the closed season shall be from June to September, inclusive. The fire of which respondent complains occurred in the month of August. In this jurisdiction the jury are the exclusive judges of the facts, while it is the duty of the court to decide all questions of law. Rem. & Bal. Code, §§ 342, 343 (P. C. 81 §§ 593, 595). It is the duty of the jury to accept and follow the law as stated by the court. Upon the effect of a jury consulting statutes during their deliberations, we find but one case in this jurisdiction. In *Edwards v. Washington Territory*, 1 Wash. Terr. 195, it is said:

"Errors are alleged in permitting the jury to take with them the statutes of the territory and the instructions of the court. . . . The jury had a right to the instructions given, and to a copy of the statutes."

No argument is made, nor are any authorities cited, in support of this announcement. The authorities upon this

exact point are far from numerous. All the cases we have been able to find hold it to be prejudicial error, or misconduct requiring a new trial, for a jury to consult law books while deliberating on their verdict. *Merrill v. Nary*, 10 Allen (Mass.) 416; *Griffin v. Bartlett*, 58 N. H. 141; *Harrison v. Hance*, 37 Mo. 185; *State v. Smith*, 6 R. I. 33; 29 Cyc. 808. In *Merrill v. Nary*, *supra*, the trial judge allowed the jury to have a copy of the general statutes while they were deliberating on their verdict, and the appellate court said:

"Indeed, we know of no method that could be adopted which would more effectually tend to confuse the minds of jurors and to mislead them in the proper discharge of their duty, than to permit them to read or refer to law books during their consultations for the purpose of ascertaining the rules of law which were applicable to the cases which are submitted for their determination. Nor are we able to see that there would be any difference in this respect whether the books which they were allowed to read were treatises, or books of reports, or volumes of statutes. The latter are often quite as difficult to interpret and apply as are the rules and principles contained in the former."

In *State v. Smith*, *supra*, the jury, through the bailiff, procured a copy of the revised statutes for use in their deliberations. In granting a new trial, the court said:

"Here the jury sent for and obtained the book they wanted for use, ignorant no doubt, of the impropriety of so doing, without the knowledge of the court, or of the defendant, or of his counsel, or of the attorney general; receiving, as it were, their instruction in the matter of law, not only from a source not open to them as jurors, but secretly, in the absence of parties and counsel, and without those checks and guards which the law places about trials for the security of the rights involved in them."

So far as we have been able to discover, the rule announced in *Edwards v. Washington Territory*, *supra*, stands without supporting authority, except in those jurisdictions where in criminal cases the jury are judges of both the law and the facts. In *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79,

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where an opinion of this court was read to the jury during the progress of the trial, we said:

"It is sufficient to say that the practice of reading from law books to the jury, in jurisdictions where the jury are the judges of the facts alone, and must accept the law as given by the court, is generally criticized and even condemned. It has been often held to be reversible error. We do not approve the practice, and yet we are not prepared to say that a case should be reversed for that reason alone, unless it is manifest that prejudicial effects resulted therefrom."

It would seem that if reading an opinion to the jury during the progress of a trial should be criticized and condemned, it would certainly be misconduct and prejudicial error for a juror to produce in the jury room, and for some of the jurors to read, a pamphlet such as the one above mentioned.

Respondent, citing *State v. Wilson*, 42 Wash. 56, 84 Pac. 409, contends that appellants cannot complain of the juror's misconduct, for the reason that there is no affirmative showing that they (appellants) were not responsible for, or connected with, such misconduct. In the case cited, it was held that, upon a motion for new trial on the ground that an attempt had been made to bribe a juror in the interests of the moving party, such moving party must show by affidavit that he had no knowledge of, or connection with, the attempt at bribery. It was there apparent that the misconduct was in the interest of the unsuccessful and moving party, who was asking relief because of an attempt at bribery in his favor. We rightfully held that it should appear that he was in no way connected with the misconduct. Similar facts do not appear in this case. The misconduct was not in appellants' interest. The pamphlet was prejudicial to them, and favorable to respondent.

Some contention is made by respondent that the jury, having determined to hold appellants liable for damages, and the pamphlet not having been produced or considered until

after such determination, the misconduct was not sufficiently prejudicial to warrant a new trial. There are numerous cases which hold that objectionable matters coming before the jury after it has agreed upon a verdict do not constitute grounds for a new trial. In the instant case, the jury were deliberating upon the amount of the verdict when the objectionable matter came before it, and we fail to see how an agreement to hold a party liable, without any completed agreement as to the amount of damages to be awarded, can amount to a verdict.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 11888. Department Two. September 22, 1914.]

H. B. ROSE, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

CARRIERS — INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. A minor killed by falling from a train is guilty of contributory negligence, precluding recovery in an action for his death, where it was shown that the minor, a boy of fourteen years of age, while a passenger on the train, went upon the lower step of the car at an open vestibule, after a warning to the passengers of the danger of standing between the cars and on the steps and after diligent efforts to keep the vestibule closed, and while standing on the lower steps, indulged in exercises by raising and lowering his body while holding onto the rods at the car entrance, thereby greatly increasing his danger, from which position he fell on being struck by the timbers of a bridge, there being nothing in his appearance to indicate to the train crew that he was not of normal temperament and intelligence.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 30, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

¹Reported in 143 Pac. 145.

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Opinion Per Curiam.

Geo. T. Reid, J. W. Quick, and L. B. daPonte, for appellant.

Hugo Metzler and Ben S. Sawyer, for respondent.

PER CURIAM.—This is an action by the respondent against the appellant to recover damages for the death of the respondent's son. On August 31, 1912, the appellant, Northern Pacific Railway Company, at the instance and request of the Tenino Commercial Club, ran an excursion train from Tenino to South Bend and return. The train furnished was a vestibuled train, consisting of some seven cars. The train was not overcrowded, and the passengers, after the train was on its way, exercised considerable freedom in passing from one car to another. The vestibules were then closed, but gradually the passengers began to open them and stand in the vestibules and on the steps of the cars. According to the evidence of the train crew, and that of a number of passengers called by the appellant, the train crew made diligent efforts to keep the vestibules closed, and repeatedly warned the passengers of the dangers of standing between the cars and on the car steps while the train was in motion. Witnesses for the respondent, however, testified to facts tending to show that the crew did not give much heed to the conditions.

The respondent and his two sons were among the excursionists. The elder son was upwards of fourteen years and ten months old, and the younger of the age of nine years. On entering the car, the respondent seated the boys in a passenger coach, and went forward to the smoking car. Sometime thereafter, the elder boy brought the younger one to the father and requested that he take charge of him, asking for permission at the same time to go back to the other end of the car and play with the other young people on the train. The father granted the permission and the elder boy left him. Sometime thereafter, the elder boy got down onto the lower step of a car at an open vestibule, and while standing

with his feet on the lower steps, holding with his hands onto the brass rods at the car entrance, raised and lowered his body by sliding his hands up and down the rods. When his hands were down, his body would protrude for some distance out from the lower car step. While in this position the train passed over a bridge, the upper frame of which came into contact with the boy's body, throwing him from the train and killing him instantly.

It is not in evidence that any of the train crew saw the boy in this dangerous position, nor was it shown that the bridge was of unusual construction. The respondent's counsel cites the witness Anderson as testifying that the timber was unusually close, but a reading of his testimony does not bear out the claim. In answer to a direct question put to him by counsel himself, he stated that he did not "believe it was closer than any other."

The boy was of the usual development for one of his age, and nothing in his appearance indicated that he was not of average intelligence. It was shown, also, that he possessed more than the average knowledge of the movement and character of railway trains and of the roads over which they ran; it being shown that he had lived for a number of years in a town on the main line of the appellant railway company, over which many trains passed daily.

At the conclusion of the evidence, the appellant moved for a directed verdict in its favor, based on the grounds that the evidence failed to show actionable negligence on its part, and that contributory negligence affirmatively appeared on the part of the boy who met with his death. The motion was denied and the cause submitted to the jury, who returned a verdict in respondent's favor for \$1,500. From the judgment entered thereon, this appeal is prosecuted.

We think the motion for a directed verdict should have been granted. While it may be that the evidence justified submitting to the jury the question of the appellant's negligence, we think there can be no two opinions as to the con-

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tributory negligence of the boy himself. His conduct was foolhardy in the extreme. He was riding at a place on the car not intended to be ridden upon by passengers, and in addition to this, engaged while there in exercises which greatly increased his danger. Since there was nothing in his appearance that indicated to the train crew that he was not of normal temperament and intelligence, his conduct, in determining the appellant's liability therefor, is to be measured by the average temperament and intelligence of persons of his own age and experience, not by any peculiarity of his own. It seems to us too much to say that a boy close to his fifteenth year would not know that it was dangerous to attempt to ride on the lower step of a train while it was moving with the usual speed between stations, and that a boy of much younger years would know that it was extremely dangerous to engage in exercises such as he engaged in while in that situation.

We are not unmindful of the rule that a youth of his age is not to be held to the same degree of care that a person of mature years is held. This we have held in a number of cases, particularly in cases between master and servant where the master has placed the servant in a dangerous situation, and in cases where children of tender years have been injured by so-called attractive nuisances. But the rule does not absolve a youth from all care. He must still exercise that degree of care commensurate with his age, and if he fails so to do, he is guilty of contributory negligence.

The judgment is reversed, and remanded with instructions to dismiss the action.

Opinion Per MAIN, J.

[81 Wash.

[No. 11901. Department One. September 25, 1914.]

OTTO HUBENTHAL, *Respondent*, v. SAMUEL W. CREIGHTON
et al., *Appellants*.¹

PLEADINGS—AMENDMENTS—VARIANCE OR FAILURE OF PROOF. Where a complaint is founded on an express contract of sale and the evidence discloses an express contract of consignment, there is an entire failure of proof, and hence the complaint cannot be amended to conform to the proofs, as is permissible in case of a variance.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 3, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

B. Vandervelde, for appellants.

Mark F. Mendenhall, for respondent.

MAIN, J.—The purpose of this action was to recover for nursery stock. The complaint alleged a sale and delivery. The answer was a general denial. Upon the trial, the plaintiff's evidence showed that the contract was not one of sale, but that the nursery stock had been delivered upon consignment, and when sold, the proceeds to be remitted to the plaintiff, less a commission of 25 per cent. At the close of the plaintiff's case, the defendants moved for a dismissal on the ground that there was a failure of proof. Thereupon, the plaintiff asked, and was permitted, over the objection and exception of the defendants, to amend the complaint to conform to the proof. At the conclusion of all the evidence, judgment was entered for plaintiff. The defendants appeal.

The first and decisive question is whether permitting the complaint to be amended was error. The complaint was founded upon an alleged express contract. The evidence showed an entirely different express contract. There is a distinction between a variance and a failure of proof. Rem.

¹Reported in 143 Pac. 98.

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& Bal. Code, § 801 (P. C. 81 § 291). If there is a variance, it may be cured by amendment, but a failure of proof is fatal to the action. In *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68, it was said:

"There is a marked distinction between an immaterial variance and an absolute failure of proof. Ballinger's Code, § 4951. The former may be cured, as we have seen, by amendment of the pleading, but the latter is fatal to the action or defense."

Where one contract is pleaded, and the proof shows an entirely different contract, there is not a variance, but a failure of proof. In *Hartman v. Belden*, 38 Wash. 655, 80 Pac. 806, the plaintiff sued the defendants for an accounting. The complaint alleged that the contract was signed by the plaintiff as one of the parties, and the defendants jointly as the other party. The proof showed that the contract was signed by one of the defendants as one of the parties, and by the other defendant and the plaintiff jointly as the other party. This was held to be a failure of proof, and the action was dismissed. It was there said:

"The complaint alleges a contract between the respondent and the appellants jointly; the proof shows a contract between the appellant Russell G. Belden and the respondent and the appellant Worth Belden jointly. This is a failure of proof under Bal. Code, § 4951 (Rem. & Bal. Code, § 801)." (Citing authorities.)

In principle, the present case cannot be distinguished from that case. There the contract as alleged was not proven. Likewise here. The plaintiff pleaded a contract of sale, and proved a consignment. Between these two contracts, there is a marked distinction. In a sale the title passes to the vendee, while in a consignment the title does not pass to the factor or broker. A failure on the part of the vendee under a contract of sale to meet the obligations incurred by his purchase subjects him only to a money judgment; while a failure of the factor or broker to properly account for goods or merchandise held by him on consignment, when sold, not

only may subject him to a money judgment, but to a more serious penalty under the criminal law. There appears to be no alternative but to sustain the claim of the error. It is not a harsh rule, however, when the facts, as in this case, are within the knowledge of the plaintiff, to require that they be set forth truthfully in the complaint.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action, without prejudice.

Crow, C. J., Gose, Ellis, and Chadwick, JJ., concur.

[No. 12095. Department Two. September 26, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Ham,
Yearsley & Ryrie, Plaintiff*, v. THE SUPERIOR
COURT FOR GRANT COUNTY, *Respondent*.¹

ACTION—STAY—PENDENCY OF OTHER ACTION—DISCRETION OF COURT. It is a proper exercise of the court's discretion to order a stay of condemnation proceedings seeking to appropriate lands at the outlet of a lake for use in an irrigation project, where another action is pending in the same court to quiet title to all the waters of said lake by parties who have succeeded to the rights of the original defendants in the condemnation proceeding and have been made additional claimants therein, and who claim the waters of said lake independent of their interest as grantees of the original condemnees, even though the condemnation suit has proceeded so far as to adjudicate in favor of the plaintiff's right to acquire the land by right of eminent domain; since the subject-matter of the two actions are so related to one another, and the establishment of the claimant's rights to all of the waters of the lake will deprive plaintiff of the fruits of a condemnation award to the land sought, that the interests of the litigants and of the public will be best served by a prior determination of the title to the waters of the lake.

Application filed in the supreme court May 28, 1914, for a writ of mandamus to compel the superior court for Grant county, Steiner, J., to proceed with the trial of a cause. Denied.

¹Reported in 143 Pac. 310.

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Opinion Per PARKER, J.

Voorhees & Canfield, for relator.

Ralph B. Williamson and Cannon, Ferris & Swan, for respondent.

PARKER, J.—This is an original mandamus proceeding in this court wherein the relator seeks to compel the superior court for Grant county to proceed with the trial of the assessment of damages and compensation in the condemnation proceeding of Ham, Yearsley & Ryrie, this relator, against the Northern Pacific Railway Company *et al.*, and the annulment of an order of that court staying proceedings therein until another action pending in that court is tried and determined, wherein certain of the defendants, additional claimants in the condemnation proceeding, are seeking to quiet their title to the waters of Moses Lake as against the claims of the relator thereto, upon which claims the right of the relator to acquire the land by condemnation proceedings rests.

The history of this controversy appears in considerable detail in our decisions upon certain questions presented in *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945, and *State ex rel. Grant Realty Co. v. Superior Court*, 76 Wash. 376, 136 Pac. 144. The facts appearing in the record before us, so far as necessary to be here noticed, may be summarized as follows: On October 7, 1910, the relator commenced condemnation proceedings in the superior court for Grant county against the Northern Pacific Railway Company *et al.*, owners of a small tract of land at the southern outlet of Moses Lake, to acquire the land for a dam site to be used in connection with the relator's prospective irrigation project. Soon thereafter, notice of the pendency of the condemnation proceeding was duly filed and made of record in the auditor's office of Grant county. On January 10, 1912, the superior court for Grant county, having regularly before it the preliminary questions of public use, necessity and the relator's right to acquire the

land by condemnation, rendered its judgment denying relator's right to prosecute the condemnation proceeding or acquire the land by right of eminent domain. On October 10, 1912, this judgment of the superior court, being before this court upon *certiorari* proceedings, was reversed and the cause remanded to the superior court with directions to allow the relator to acquire the land by condemnation and enter its preliminary order accordingly, which was done September 9, 1913. Thus it became adjudicated, as between the relator and the original defendants in the condemnation proceeding, that the relator had the right to condemn the land and acquire the same by right of eminent domain. This adjudication was based upon facts as they existed on January 10, 1912, the date of the disposition of that question adverse to the relator by the superior court. Upon the record as made in the superior court up to that date, and as presented to this court upon *certiorari* from that court, the right of the relator to condemn and acquire the land by right of eminent domain rested upon its right to the waters of Moses Lake as then appearing, since the future existence of the relator's irrigation project depended upon its right to such waters; that is, its ability to devote the land sought to be condemned to public use depended upon its right to the waters of Moses Lake, there being no other water available for its irrigation project. Thereafter, on October 14, 1913, the superior court for Grant county entered an order in the condemnation proceeding in disposing of certain motions made therein, reciting, among other things:

"It further appearing to the court, however, that the said Grant Realty Company, Manhattan Realty Company, Nashota Realty Company, Pelican Realty Company, Stade Realty Company, Neppel Townsite Company, Park Realty Company, McConihe-Moses Lake Irrigation Company and F. H. Nagel, have an interest in the subject-matter of this action, and that a complete determination of the controversy cannot be had without the presence of said parties,

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"It is ordered that pursuant to section 196 of Remington & Ballinger's Code the said parties, to wit, Grant Realty Company, Manhattan Realty Company, Pelican Realty Company, Nashota Realty Company, Stade Realty Company, Neppel Townsite Company, Park Realty Company, McConihe-Moses Lake Irrigation Company and F. H. Nagel and all of them shall be made additional parties defendant or claimant and shall appear herein without service of process to which the above named parties agree in open court. . . ."

For convenience, we will hereafter refer to these new parties as additional claimants. The claim of interest of these additional claimants in the condemnation proceeding is rested upon their claim as grantees of the Northern Pacific Railway Company and the other original defendants who conveyed their title to the land sought to be condemned to these additional claimants, pending the condemnation proceeding, and also the claimed right of the additional claimants to the waters of Moses Lake, independent of their interest as grantees of the Northern Pacific Railway and other original plaintiffs in the condemnation proceeding. Thereafter, on November 19, 1913, these additional claimants filed in the condemnation proceeding a motion asking the vacation of the preliminary order of condemnation in favor of the relator as against the original defendants therein, with a view to having the question of the relator's right to condemn and acquire the land by right of eminent domain as against these additional claimants tried anew, claiming that the relator had no such right of condemnation as against these additional claimants because of their right to all of the waters of Moses Lake, which right, as we have seen, if successfully maintained by these additional claimants, would render of no avail the relator's right to appropriate and put to public use the land sought to be condemned. On the same day, to wit, November 19, 1913, these additional claimants commenced an independent action in the superior court for Grant county, seeking to quiet their title to the waters of Moses Lake as against the relator, setting up their claim of right

thereto substantially as in their motion made in the condemnation proceeding. The fact of the commencement of such action in the superior court was also set up in their motion filed in the condemnation proceeding. By their motion in the condemnation proceeding, the additional claimants ask, among other things, that further proceedings therein, looking to the assessing of damages and compensation to be awarded for the taking of the land, shall be stayed until the right of the relator to condemn and acquire the land and also its right to the waters of Moses Lake, as against these additional claimants, shall have been determined. This motion coming on for hearing before the court on the 29th day of April, 1914, was, by the court, disposed of as follows:

"It is hereby ordered, adjudged and decreed that said motion be, and the same are hereby denied, save and except the motions of the additional claimants for a stay of all proceedings herein, which motion is granted, and all proceedings herein are stayed until the action now brought and pending in the above entitled court, wherein The Grant Realty Company, a corporation, *et al.*, are plaintiffs, and Ham, Yearsley & Ryrie, a corporation, *et al.*, are defendants, the same being cause No. — of the records and files in the office of the clerk of the above entitled court, has been tried and determined.

"It is further ordered that the additional claimants herein are given leave to make further application to this court for a vacation of the order of appropriation in this case, should it be necessary for said additional claimants to have such order vacated after the said cause above referred to has been determined in this court."

It is to annul this order and compel the superior court for Grant county to proceed with the trial of the assessment of damages and compensation for the taking of the land, that this mandamus proceeding is here prosecuted.

A statement of these facts renders it apparent that we have here two pending actions in the same court, wherein the issues are so related as to possibly result in much useless and

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fruitless litigation if the questions involved be not disposed of in proper order. It is argued by counsel for the relator that these additional claimants have no standing whatever in the condemnation proceeding except as mere successors in interest of the original defendants therein, owners of the land sought to be condemned. Also, that the right of the relator to condemn and acquire this land has been adjudicated finally in its favor so that that adjudication cannot now be challenged even by these additional claimants, claiming the waters of Moses Lake independent of their interest as grantees of the original defendants in the condemnation proceeding. This presents the interesting inquiry: Is such an adjudication final in favor of the condemner as against additional claimants, whom it may become necessary, in the judgment of the court, to bring into the condemnation proceeding as defendants, after the preliminary appropriation adjudication. This is a question of serious moment, and we think the learned trial court was warranted in deferring its decision thereon pending the determination of the additional claimants' rights to the water of Moses Lake, in the pending action involving such rights. Should the decision in that action be in favor of the additional claimants, it would render the relator's condemnation proceeding of no avail to it unless we assume that it may, by virtue of the order of appropriation, in any event, now acquire the land without having the ability to put it to public use. Such a decision would suggest strongly, if not conclusively, that the order of appropriation should be vacated, though it is seemingly a final judgment on that question in relator's favor.

We do not wish at this time to be understood as expressing any opinion upon the question of the finality of the preliminary order of condemnation rendered by the superior court in compliance with the decision of this court in favor of the relator, as against these additional claimants. However, in view of the circumstances surrounding the whole controversy, we are of the opinion that the learned superior court did not

abuse its discretion in so controlling the order of the disposition of the two causes as to first cause the question of the right of the respective parties to the waters of Moses Lake to be determined, in view of the possible influence that the disposition of that question may have upon the relator's right to acquire and hold the land by right of eminent domain. We think that both the interest of the litigants and the interest of the public will be best served by proceeding in the order directed by the learned superior court. In *State ex rel. McDonald v. Steiner*, 44 Wash. 150, 87 Pac. 66, and *State ex rel. Murphy v. Snook*, 78 Wash. 671, 139 Pac. 764, some observations will be found in harmony with the conclusion we here reach.

The order of the learned trial court sought to be annulled is affirmed, and the writ prayed for is denied.

CROW, C. J., FULLERTON, MORRIS, and MOUNT, JJ., concur.

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[No. 11931. Department Two. August 8, 1914.]

WILLIAM J. SMITH, *Respondent*, v. CHARLES B. EATON *et al.*,
Appellants.¹

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered October 23, 1913, upon findings in favor of the plaintiff, in an action to foreclose a mortgage. *Affirmed*.

Parker, Richards & Fontaine, for appellants.

Englehart & Rigg, for respondent.

PER CURIAM.—This is an action to foreclose a mortgage, given by the defendants to the plaintiff to secure a portion of the purchase price of land sold by him to them. The defendants admit the execution of the mortgage to secure a portion of the purchase price of the land; but, as affirmative defense, claim damages against the plaintiff, which are sought to be offset against the amount due upon the mortgage. The damages are alleged to have resulted to the defendants from false representations made by the plaintiff to them at, and prior to, the time of the sale as to the character of the orchard upon the land. A trial resulted in a decree in the superior court foreclosing the mortgage for the full amount thereof as prayed for, and a denial of the defendants' claim for damages as an offset. From this disposition of the cause, the defendants have appealed.

There is not involved in this controversy any matter calling for serious consideration other than questions of fact. We have carefully read all of the evidence to which our attention has been called by the abstract filed by counsel for appellant, and deem it sufficient to say that we do not feel warranted in disturbing the judgment of the trial court, in view of the conflict in the testimony and the burden of proof resting upon appellants to prove the alleged false representations on the part of respondent and damages resulting therefrom to appellants.

The judgment is affirmed.

¹Reported in 142 Pac. 1199.

[No. 12054. Department One. August 10, 1914.]

EILERS MUSIC HOUSE, Respondent, v. SAMUEL ARCHER, Appellant.¹

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 7, 1914, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

A. R. Rutherford and C. E. Hughes, for appellant.

E. P. Whiting, for respondent.

MAIN, J.—This action was instituted to recover possession of personal property, or in the alternative, damages for its detention.

Some time prior to the month of May, 1912, the defendant leased to the firm of Goodman & Helgesen, the premises at No. 132, North Broadway, in the city of Seattle. Goodman & Helgesen occupied the premises as a piano store. In June, 1912, Helgesen, one of the partners, retired from the business. Thereafter the business was continued by Goodman. In May, 1912, the plaintiff delivered the player piano in question in this action, together with others, to Goodman & Helgesen, under a written contract. In November, 1912, the defendant received the piano from Goodman in payment of the rent then owing by Goodman to the defendant.

The only question in the case is whether the writing under which the piano was delivered to Goodman & Helgesen constituted a conditional sale contract. In the recent case of *Eilers Music House v. Fairbanks*, 80 Wash. 379, 141 Pac. 885, this identical question upon the same contract was presented. It was there held that the writing did not constitute a conditional sale contract. For a discussion of the question, reference is made to the opinion in that case.

The judgment will be affirmed.

Crow, C. J., Gose, Ellis, and Chadwick, JJ., concur.

¹Reported in 142 Pac. 453.

[No. 11761. Department One. August 18, 1914.]

**THE STATE OF WASHINGTON, on the Relation of F. A. Kern,
Respondent, v. ANNIE SCHROFFER et al., Appellants.¹**

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 4, 1913, upon findings in favor of the plaintiff, in an action to abate a nuisance, tried to the court. **Affirmed.**

A. L. Stemmmons, for appellants.

F. A. Kern and Jay A. Whitfield, for respondent.

PER CURIAM.—This case was submitted with the case of *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 Pac. 753. The two cases involved the construction and constitutionality of the same law. The briefs in this case were examined and considered prior to the writing of the opinion in the *Jerome* case. Through inadvertence the decision in this case was not filed at the same time as the opinion in the *Jerome* case. Upon the authority of that case, the judgment will be affirmed.

[No. 12163. Department One. September 9, 1914.]

**THE STATE OF WASHINGTON, on the Relation of Washington Public
Service Company, Appellant, v. THE SUPERIOR COURT
FOR THURSTON COUNTY, Respondent.²**

Certiorari to review a judgment of the superior court for Thurston county, Dykeman, J., entered June 15, 1914, adjudging a public use, in condemnation proceedings. **Affirmed.**

Thomas M. Vance and Frank C. Owings, for appellant.

Geo. R. Bigelow and P. M. Troy, for respondent.

PARKER, J.—The city of Olympia is seeking to acquire, by eminent domain proceedings, prosecuted in the superior court for Thurston county, the water works plant of the relator. Preliminary hearing was had, resulting in an adjudication by that court that the contemplated use of the property by the city is a public use, and that the city has the power to acquire the property by right of eminent domain. The relator now seeks by writ of review to have that adjudication reversed by this court.

¹Reported in 142 Pac. 1199.

²Reported in 143 Pac. 1198.

It is contended by counsel for the relator that the city is indebted in a sum exceeding its constitutional debt limit, and that, therefore, it is without power to prosecute its eminent domain proceedings. This contention is rested upon the theory that, in the event the proceedings should be abandoned by the city by reason of its inability to pay the amount the jury may award for the taking of the property, together with costs incurred by the relator, from the special fund to be created by the issuance of bonds against the city's water plant, the relator will be without remedy against the city for its costs incurred in the proceedings, and the city thereby, in effect, will incur an obligation in excess of its constitutional debt limit, which it will have no power to pay.

In the case of *State ex rel. Olympia v. Holmes*, ante p. 403, 142 Pac. 1148, it was determined that the city was not beyond its constitutional one and one-half per cent debt limit. The facts of that case touching this subject are concededly applicable to this question as here presented. This conclusion renders it unnecessary for us to consider other questions presented. We conclude that the superior court was not in error in adjudging that the city had power to proceed.

The adjudication is affirmed, and the cause remanded for further proceedings.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11639. Department One. September 16, 1914.]

O. S. SAMPSON *et al.*, Appellants, v. THE CITY OF LEAVENWORTH *et al.*
*Respondents.*¹

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 10, 1913, upon findings in favor of the defendants, confirming an assessment roll for a local improvement, tried to the court. Affirmed.

Charles S. Albert, Thomas Balmer, and E. H. Fox, for appellants.
L. J. Nelson and Wm. H. Pratt, for respondents.

PER CURIAM.—The questions presented in this case are the same as those in the recent case of *Great Northern R. Co. v. Leavenworth*, ante p. 511, 142 Pac. 1155. Upon the authority of that case, the judgment will be affirmed.

¹Reported in 142 Pac. 1155.

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Opinion Per Curiam.

[No. 12341. Department One. September 21, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. NORTHERN EXPRESS
COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 16, 1914, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to collect a tax. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

PER CURIAM.—This action, which was commenced by the state of Washington against the Northern Express Company, a corporation, to recover a privilege tax of five per cent of the gross receipts of the defendant corporation for business done within the state of Washington for the year 1912, has heretofore been before this court; our former opinion being reported in 80 Wash. 309, 141 Pac. 757. After remittitur, the demurrer of the plaintiff to the answer of the defendant was sustained. Thereupon the defendant stood upon its answer, refused to plead further, and judgment was entered against it for the amount demanded in the complaint. From this judgment, the defendant has appealed.

A statement of the case may be found in our former opinion and need not be repeated here. The appellant now contends that the act of 1907 (Rem. & Bal. Code, §§ 9161-9168; P. C. 433 § 73 *et seq.*), is unconstitutional, being in violation of § 8 of art. 1, the same being the commerce clause of the constitution of the United States. The points now raised were all passed upon in the former opinion of this court adversely to appellant's contentions, and for the reasons therein assigned, the judgment is now affirmed.

¹Reported in 143 Pac. 99.

[No. 11913. Department One. September 22, 1914.]

JOHN DAVAZ, *Appellant*, v. PANHANDLE LUMBER COMPANY, LIMITED,
Respondent.¹

Appeal from a judgment of the superior court for Pend Oreille county, Jackson, J., entered November 24, 1913, upon findings in favor of the defendant, in an action on contract, tried to the court. **Affirmed.**

M. F. Ryan, for appellant.

Chas. L. Heliman and *S. W. Rogers*, for respondent.

PER CURIAM.—This is an action to recover a balance due upon an open account for goods delivered to a third party, it being alleged that the defendant, before the delivery, promised to pay for them. The court found all the issues in favor of the defendant, and entered a judgment in its favor for costs. The plaintiff appealed.

The case is controlled by *Pressentin v. Hawkeye Timber Co.*, 77 Wash. 388, 137 Pac. 999, and was correctly decided. **Affirmed.**

¹Reported in 143 Pac. 1198.

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24. APPEAL—HARMLESS ERROR—SCOPE OF ACCOUNTING. In an action for an accounting, the inclusion in the final account of sums admittedly due to the plaintiff, upon land contracts assigned to the defendants, is not prejudicial error, where it appeared that the assignments were of contracts connected with the subject-matter of the agency, the parties were all before the court, no surprise was claimed, and defendants included the items in a statement looking to an adjustment of the account with plaintiff. *Modern Irrigation & Land Co. v. Neely*..... 38
25. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error cannot be predicated on the exclusion of evidence, where the testimony admitted covered everything included in the offer. *Seattle, Port Angeles & Lake Crescent R. v. Land*..... 206
26. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE. Error cannot be predicated upon the exclusion of evidence as to a conversation after having admitted part of it, where the entire transaction was testified to by other witnesses. *Pearson v. Gullans*..... 57
27. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian struck by an automobile, it is not prejudicial error that the court, after correct instructions defining contributory negligence, in response to a remark of counsel for plaintiff, "that wouldn't be true if they were exceeding the speed limit," stated that that would be taken into consideration with the other instructions as to whether there was a violation of the speed limit, and that if defendant was violating the ordinance, the law would conclusively presume the defendant guilty of negligence, where the court had already instructed as to the reciprocal rights and duties of the parties, and clearly intended that the instruction should be taken into consideration with those already given. *Moy Quon v. Furuya Co.*..... 526
28. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for damages for negligently permitting a fire, started by a donkey engine, to spread to plaintiff's sawmill, the giving of an instruction in accordance with Rem. & Bal. Code, § 5284, that it was unlawful during the closed season for any person who shall start a fire in any manner upon forest lands not his own to leave the same unquenched, is not prejudicial error in that the jury were, in effect, told that it would be unlawful to start a fire in any manner and leave it un-

APPEAL AND ERROR—CONTINUED.

quenched, even though started without negligence and for a lawful purpose, and though there was no negligence in failing to quench it, where, taken in connection with other instructions, the jury clearly understood that recovery could only be predicated on defendant's negligence in starting or in failing to quench the fire. *Bouton-Perkins Lumber Co. v. Huston*..... 678

29. **APPEAL—HARMLESS ERROR—INSTRUCTIONS.** Error cannot be assigned on the refusal to give instructions covered in the general charge. *Woodard v. Cline Lumber Co.*..... 85

APPEARANCE:

As waiver of objections to public improvement proceedings, see **MUNICIPAL CORPORATIONS**, 18.

APPLIANCES:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1, 2, 7, 10, 13.

APPORTIONMENT:

Of assessments against property for benefits from street improvement, on settlement of estate, see **LIFE ESTATES**, 5.

APPROVAL:

Of lieu land selections, see **PUBLIC LANDS**, 3.

ARBITRATION AND AWARD:

1. **ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE—TENDER—RIGHT TO SUE.** Where it is stipulated in a contract that all differences between the parties arising out of the contract shall be submitted to a board of arbitrators, whose decision therein shall be final and conclusive, no action can be maintained on the contract until after a tender of arbitration of differences to the other party and a refusal thereof. *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.* 592
2. **ARBITRATION AND AWARD—CONTRACTS—DISPUTE BETWEEN PARTIES—DUTY TO ARBITRATE—EVIDENCE.** Findings that there was no dispute between parties calling for arbitration in such case, is not sustained by the evidence, where there was a clear dispute in the pleadings, and defendant's officers testified to their faithful performance of the contract and its breach by plaintiff, and plaintiff retaliated by attempting to show defendant's nonperformance and its termination by such breach, and upon a second cause of action, the defendant offered evidence of the amount due and its nonpayment, while plaintiff offered evidence of breach and sought to counterclaim for damages. *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*..... 592

ARCHITECTS:

Approval of work under contract, see **CONTRACTS**, 5-7.

ARREST:

Illegal arrest, see **FALSE IMPRISONMENT**.

Liability of surety on official bond, for unlawful arrest by officer, see **MUNICIPAL CORPORATIONS**, 3.

1. **ARREST—IN CIVIL ACTIONS—RIGHT OF ARREST—STATUTES.** There being no statute in this state authorizing the arrest of absconding debtors, the provisions of Const., art. 1, § 17, permitting such arrest not being self-executing, a person causing the arrest of another is liable therefor, even though the arrest be in pursuance of an order of court without or in excess of jurisdiction, and it is immaterial that the arrest may have been caused without malice and with probable cause. *Hayes v. Hutchinson & Shields*..... 394

ASSAULT:

On prisoner by inmates of jail, see **SHERIFFS AND CONSTABLES**.

ASSESSMENT:

Of benefits to land from maintenance of dikes, see **CONSTITUTIONAL LAW**, 1.

Of expenses of public improvements, see **DRAINS; MUNICIPAL CORPORATIONS**, 11, 15-20.

Of benefits against property of estate for street improvement, apportionment of on final settlement, see **LIFE ESTATES**, 5.

Of tax for horticultural purposes, repeal of act, see **STATUTES**, 16, 19.

ASSETS:

Of city, in determining existence of debt limit, see **MUNICIPAL CORPORATIONS**, 34, 36, 37.

ASSIGNMENTS:

Indorsement of nonnegotiable note as assignment, see **BILLS AND NOTES**, 6.

Leases, see **LANDLORD AND TENANT**, 1.

1. **ASSIGNMENTS—CONTRACT OF EMPLOYMENT—ABROGATION.** Where a contract employing brokers to purchase Indian allotments for a corporation provided for stated commissions in case certain of the allotments were secured within a limited time through sources other than the efforts of the brokers, thereby recognizing possible failure as the result of their efforts, an assignment by one broker of his interests in the contract to the other, does not operate as an abrogation of the contract and bar recovery of commissions earned, it being conceded that the brokers acted in good faith and made honest effort to secure the allotments; since, although contracts calling for

ASSIGNMENTS—CONTINUED.

professional services requiring special qualifications are not assignable, the broker could assign his interests in the contract in so far as they were earned. *Lord v. Wapato Irrigation Co.*..... 561

2. **ASSIGNMENTS — JOINT CONTRACT WITH BROKERS — COMMISSIONS — TENDER OF PERFORMANCE.** A contract employing brokers to secure Indian allotments for a corporation, which provided that if the brokers acted promptly and faithfully and the purchaser should put the land on the market for sale, it would appoint them sole agents and pay commissions on sales made, implies the rendition of services, or tender of services, by both brokers, and a tender of performance by one broker, after assignment to him of the other's interest in the contract, does not entitle the assignee to a recovery of commissions, since the contract involved services requiring special qualifications, and was not assignable without consent of the employer. *Lord v. Wapato Irrigation Co.*..... 561
3. **SAME—CONSENT TO ASSIGNMENT—RATIFICATION—EVIDENCE — SUFFICIENCY.** In such a case, the evidence is insufficient to sustain a finding that the corporation consented to and ratified the assignment of the broker's interest in the contract to his co-employee and substituted the assignee as sales agent under the contract, where it appears that, dissatisfaction having arisen between the brokers, a consultation was had between the assignee, a director of the corporation and a third person relative to purchasing the assignor's interests, and an agreement had to that effect, whereupon the assignee purchased the interests with his own funds, the corporation not being a party to the agreement, and the majority of the directors thereafter refusing to consent thereto, that letters from the president of the corporation, while showing a desire to have the assignee's services as selling agent and a willingness to pay him the regular commission on sales made, were general in their statements and were such as would be sent to any agent, and that a conversation between the assignee and a director of the corporation was insufficient to justify the conclusion that the corporation ratified the assignment or substituted the assignee as sales agent. *Lord v. Wapato Irrigation Co.*..... 561

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 3, 5, 10.

ATTACHMENT:

1. **ATTACHMENT — GROUNDS — BURDEN OF PROOF — EVIDENCE — SUFFICIENCY.** The plaintiffs failed to sustain the burden of proof showing grounds for a writ of attachment, where their single evidential affidavit averred facts not grounds therefor, and every material fact relied on to sustain the writ was sufficiently denied or explained by the defendants' controverting affidavits. *Nettleton v. Howe.*.... 32

ATTACHMENT—CONTINUED.

2. **ATTACHMENT—PLEADING—AFFIDAVITS—NEGATIVE PREGNANT.** Where the procuring affidavit alleged, in the conjunctive, the statutory grounds for attachment, the affidavit supporting defendants' motion to dissolve the attachment is not bad as a negative pregnant in that a clause contained therein denied the allegations, also in the conjunctive, where it further alleged, in effect, matter negating every allegation of the plaintiffs' procuring affidavit, and the same will be held sufficient to put in issue the allegations of plaintiffs' affidavit, under the statutory rules commanding a liberal construction of pleadings, and in the absence of a demurrer thereto or of a motion to make its denials more specific. *Nettleton v. Howe*..... 32
3. **ATTACHMENT — DISSOLUTION — AFFIDAVITS — TRIAL — ISSUES AND PROOF.** On hearing of a motion to dissolve an attachment, in which defendants' moving affidavit was a sufficient traverse of plaintiffs' procuring affidavit, thereby presenting an issue, the court committed no error in admitting defendants' evidential affidavits, and the burden of proof rests on the attaching party. *Nettleton v. Howe*... 32

ATTORNEY AND CLIENT:

Admissions of counsel as binding client, see **APPEAL AND ERROR**, 11.
 Stipulation in note for attorney's fees, see **BILLS AND NOTES**, 2.
 Argument and conduct of counsel at trial in civil actions, see **TRIAL**, 2.

1. **ATTORNEY AND CLIENT—NOTICE TO ATTORNEY—SCOPE OF EMPLOYMENT.** An attorney employed to pass upon the title to personal property is not a general agent of the client, and notice to him of the price paid by the vendor will not be binding upon the client; since it is not within the scope of his employment and he is therefore not bound to communicate any collateral fact touching a contract between his client and the vendor, although he had knowledge of facts that would estop his client if they had been known to him. *Forsth v. Dow*..... 137

AUTHORITY:

Of attorney, see **ATTORNEY AND CLIENT**.
 Of agent to waive proofs of loss, see **INSURANCE**, 1.
 Of secretary of state upon canvass of signatures to initiative petition, see **STATUTES**, 2, 9-11, 14.

AUTOMOBILES:

Collision with in city street, see **MUNICIPAL CORPORATIONS**, 21-30.

AWARD:

See **ARBITRATION AND AWARD**.
 Recovery by owners of award in condemnation wrongfully held by corporation, see **GARNISHMENT**.

BANKS AND BANKING:

1. **BANKS AND BANKING — GUARANTY — ULTRA VIRES — ESTOPPEL.** A bank is estopped to set up the defense of *ultra vires* in the making of a contract guaranteeing the payment of an account by one of its customers, a contractor, to a manufacturing company for supplies furnished, where the bank, upon receipt of a letter from the manufacturing company expressing some doubt as to the binding force of the guaranty, and requesting confirmation of a telegram previously sent notifying them that the bank guaranteed the account, wrote them that it was secured by a note for \$2,000 and that its telegraphic guarantees were accepted by other banks, and that the telegram in question "is a guarantee in fact;" since the bank, though neither prohibited nor given power by statute to enter into such contracts, having lulled the company into a position of financial security upon which it relied to its injury, public policy demands an enforcement of the contract. *Creditors Claim & Adjustment Co. v. Northwest Loan & Trust Co.*..... 247

BAR:

- Dismissal on merits as bar to second prosecution, see **CRIMINAL LAW**, 1, 2.
- Of actions by former adjudication, see **DIVORCE**, 4, 5; **JUDGMENT**, 6, 7.
- Of action by limitation, see **LIMITATION OF ACTIONS**.

BASTARDS:

1. **BASTARDS — ACKNOWLEDGMENT BY PARENT — DISCOVERY — EXHUMATION OF BODY.** Where, in probate proceedings, the question of the parentage of children was in issue, and it was shown that the father, upon obtaining a divorce from his first wife, acknowledged and swore in the presence of a witness that the children in question were born to his first marriage, thereby admitting them to be his children, as provided by Rem. & Bal. Code, § 1345, the court is not justified in ordering disinterment of the father's body and the appointment of physicians for the purpose of determining his alleged impotence. *State ex rel. Meyer v. Clifford*..... 324

BEDS:

- Title to beds of unnavigable lakes, see **WATERS AND WATER COURSES**, 1-3.

BENEFITS:

- Redetermination of question of benefits from dikes as disturbance of vested rights, see **CONSTITUTIONAL LAW**, 1.
- To lands from diking district, see **DRAINS**.
- To property from improvement, see **MUNICIPAL CORPORATIONS**, 15-20.

BEST AND SECONDARY EVIDENCE:

- In civil actions, see **EVIDENCE**, 2.

BIAS:

Of witness, see **WITNESSES**.

BIDS:

Withdrawal before acceptance, see **CONTRACTS**, 2.

On public work, see **MUNICIPAL CORPORATIONS**, 11.

BILL OF LADING:

Transfer of title to goods, see **SALES**, 1, 2.

BILLS AND NOTES:

Recitals in mortgage as affecting time for payment of note, see **MORTGAGES**, 1.

1. **BILLS AND NOTES—NEGOTIABILITY—RECITALS AS TO MORTGAGE.** A recital in a note that it is of even date with a mortgage securing the note, but without expressly adopting the conditions of the mortgage, renders the mortgage ancillary thereto, the conditions of which alone do not change the character of the note as a negotiable instrument, under Rem. & Bal. Code, § 3394, providing that an unqualified order or promise to pay is unconditional though coupled with "a statement of the transaction which gives rise to the instrument." *Bright v. Offield*..... 442
2. **SAME—PAYMENT—MATURITY OF NOTE—ACCELERATION—DEFAULT OF MAKER.** Conditions in a note that if default be made in the payment of any of certain interest notes, as the same mature, for the space of thirty days, the whole amount of the note will at once be due and payable, together with provisions for payment with exchange on New York and for a reasonable attorney's fee in case of suit, do not render the note nonnegotiable, Rem. & Bal. Code, § 3393, providing that the sum payable is a sum certain, although to be paid by stated installments, with a provision that upon default in payment of interest the whole shall become due; or with exchange, whether at a fixed rate, or the current rate, or with attorney's fees in case payment shall not be made at maturity. *Bright v. Offield* 442
3. **SAME—MATURITY—ACCELERATION—CONTINGENT PAYMENT.** A provision in a note accelerating maturity by nonpayment of taxes and assessments on property mortgaged to secure the note does not render the note nonnegotiable, when considered only with reference to the time of payment, and without regard to the amount thereof, Rem. & Bal. Code, § 3395, subd. 2, providing that an instrument is payable at a determinable future time, within the meaning of the act, which is expressed to be payable on or before a fixed or determinable future time specified therein, applying to a note in which the only time of payment is "on or at a fixed period after the occurrence of a specified event which is certain to happen," and not to a

BILLS AND NOTES—CONTINUED.

note payable at all events at a time certain, but accelerated in maturity on the happening of a contingency. *Bright v. Offield*..... 442

4. **SAME—PAYMENT OF NOTE—AMOUNT DUE—CERTAINTY.** The negotiable character of a note is destroyed by a provision therein reciting that if the maker shall allow the taxes or any other public rates and assessments on the mortgaged property to become delinquent, or in case any taxes or assessments shall be levied against the holder on account of the note, then the whole amount secured shall become due and payable, and the mortgagee may at once proceed to collect the note and foreclose the mortgage given to secure the same, and sell the property, or so much as shall be necessary to satisfy the debt, interest and costs, and all taxes, public rates or assessments that may be due thereon; since there is an implication that the maker of the note is charged with the payment of the taxes, etc., the amount of which is uncertain, thereby rendering the amount of recovery under the note uncertain. *Bright v. Offield* 442
5. **SAME—MATURITY—ACCELERATION — IMPAIRING SECURITY.** A provision in a note secured by a mortgage that if the maker shall do any act whereby the value of said mortgaged property shall be impaired, the whole amount shall become due and payable, and the mortgagee may proceed to collect the debt and foreclose the mortgage, destroys the negotiability of the note, since it is, in effect, an undertaking to prevent the doing of certain things in addition to the payment of money, and the provision being similar to a condition authorizing the holder to declare the note due at any time he may deem the debt insecure, thereby destroying the negotiable character of the note. *Bright v. Offield*..... 442
6. **SAME—NONNEGOTIABLE NOTE—INDORSEMENT.** The indorsement of a nonnegotiable note operates only as an assignment, and does not make the assignor liable thereon either as maker, guarantor, or indorser. *Bright v. Offield*..... 442

BONA FIDE PURCHASER:

Of goods, see **SALES**, 1.

BONDS:

See **INJUNCTION**.

On appeal, see **APPEAL AND ERROR**, 2.

Limitation of action on contractor's bond, see **LIMITATION OF ACTIONS**.

Municipal officers, see **MUNICIPAL CORPORATIONS**, 3.

Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 7, 8.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 31-33.

BOUNDARIES:

1. **BOUNDARIES — MONUMENTS — GOVERNMENT CORNERS — LOCATION — EVIDENCE.** The evidence is sufficient to show the existence of a

BOUNDARIES—CONTINUED.

quarter section corner as located one hundred and five feet west of a true north and south line between two sections, where there was positive testimony of plaintiffs' witnesses, who had lived in the locality many years, that they had knowledge of such quarter corner it having been pointed out to some of them, while others testified to the location of a cemetery and certain other lands by reference thereto, the only testimony in opposition thereto being of a negative character. *Cunningham v. Weedn*..... 96

BREACH:

Of contract, see **CONTRACTS**, 4, 8, 10.
Of warranty, see **SALES**, 3, 4.

BROKERS:

Assignment of interest in contract to co-employee, see **ASSIGNMENTS**.
As experts as to real estate values, see **EVIDENCE**, 8.
Fraud of inducing exchange of properties, see **FRAUD**, 2, 4, 5, 7.
Contract to pay broker's commissions as within statute of frauds, see **FRAUDS**, **STATUTE OF**, 1-4.
Liability for interest on open account, see **INTEREST**.

1. **BROKERS—CONTRACT OF EMPLOYMENT—CONSTRUCTION.** A contract employing brokers to procure consents to purchase certain Indian allotments is not absolute in providing that the brokers will procure one-third of the acreage in three of the allotments desired, thereby rendering them liable in damages for a breach thereof, but is an employment of the brokers to negotiate for the purchase of the lands, a performance on their part being an endeavor in good faith to procure the property; especially where the contract provided for the payment of commissions though the property be secured through sources other than the efforts of the brokers. *Lord v. Wapato Irrigation Co.*..... 561
2. **BROKERS — EMPLOYMENT — CONTRACT — TERMINATION.** A contract employing brokers to purchase certain Indian allotments for an irrigation company is not terminated by the individual acts of representatives of the company, where the brokers did not consent to termination, nor waive any rights they might have under the contract. *Lord v. Wapato Irrigation Co.*..... 561
3. **SAME—TERMINATION OF CONTRACT—CONSTRUCTION.** In such a case, the fact that the corporation did not delay purchasing the three allotments beyond the time agreed upon, thereby defeating the brokers' claim for commissions, would not indicate that the contract had been terminated, since the corporation was bound to exercise good faith in performing the conditions imposed by the contract. *Lord v. Wapato Irrigation Co.*..... 561

BROKERS—CONTINUED.

4. **BROKERS — CONTRACT OF EMPLOYMENT — COMMISSIONS — RIGHT TO RECOVER—CONSTRUCTION.** A clause in a contract limiting the price brokers were authorized to pay for certain Indian allotments, does not defeat the right to recover commissions under another clause of the contract providing therefor in case the allotments were secured within a limited time through sources other than the efforts of the brokers, resulting in larger commissions than if the brokers had been successful, the provisions being in no way dependent, and it being evident that the brokers desired compensation for their services whether successful or not, which the contract allowed subject to the limitation imposed, it being conceded that the brokers acted in good faith and made diligent effort to obtain the property according to the terms of the agreement. *Lord v. Wapato Irrigation Co.*..... 561
5. **BROKERS — CONTRACT OF EMPLOYMENT — COMPENSATION—TIME FOR PERFORMANCE—LIMITATION.** Where a contract employing brokers to procure certain Indian allotments provided that, when consents to the sale of five of the allotments were obtained and delivered to a corporation, it would pay to the brokers the compensation agreed upon therefor, and provided in another paragraph of the contract that in case the corporation secured title to three other allotments through any source whatever within one year from the receipt of deeds to the lands purchased under the first five allotments, the brokers would receive \$3,000 and a commission of seven and one-half per cent, as though such consents and deeds had been secured through their efforts, the limitation respecting the time for acquiring title to the three allotments began to run from the date of the final deeds to the five allotments, and not from the time consents were obtained and delivered to the company. *Lord v. Wapato Irrigation Co.*..... 561
6. **BROKERS—EMPLOYMENT—SALES BY OWNER—COMMISSIONS—VESTED INTEREST.** A broker is not entitled to recover commissions on a sale of property by the owners thereof, on the ground that he had a vested interest in the property created by a contract employing him to obtain consent to purchase certain Indian allotments, and to subsequently act as sales agent, the contract with reference to the appointment of selling agents providing that if the broker acted promptly and faithfully, and the purchaser should put the property on the market for sale, it would appoint the broker its sole agent and pay commissions on sales made, since the agreement was a contingent promise or option and inconsistent with the idea of a vested interest. *Lord v. Wapato Irrigation Co.*..... 561
7. **BROKERS — CONTRACT FOR COMMISSIONS — PERFORMANCE — SALE BY OWNER.** Where brokers authorized to sell property were not permitted to complete negotiations pending between them and a pros-

BROKERS—CONTINUED.

pective customer, being told to temporarily cease their efforts to close a sale, but the owners took up negotiations and, without consulting the brokers, entered into an option contract of sale, the owners are estopped from asserting that the brokers failed to furnish a customer able and willing to take the property on the terms under which they were authorized to sell; the general rule that the securing of an optional contract of sale by a broker employed to effect an actual sale does not entitle him to recover a commission in advance of a sale, not applying in such case. *Duncan v. Parker* 340

8. **BROKERS—CONTRACT FOR COMMISSIONS—RIGHT TO FORFEITED DEPOSITS—CONSTRUCTION.** Brokers employed to sell real property and not to negotiate options, are not entitled to retain sums paid for options and forfeited by intending purchasers during the life of the agreement, but are bound to account for the same, since the consideration for the payments being furnished by the owner, he is entitled to the money. *Modern Irrigation & Land Co. v. Neely*..... 38

9. **SAME—ACTION FOR COMMISSIONS—DEFENSES—CONTRACT OF OWNER.** In an action by brokers to recover commissions claimed to be due for the sale of certain real and personal property, upon the owners' obtaining an option contract of sale, the brokers not being permitted to complete negotiations pending between them and the customer, the owners cannot plead the terms of the contract as a defense to the right of the brokers to recover; since they could not make a contract with the brokers' customer defeating their right to commissions until after the brokers had concluded their negotiations. *Duncan v. Parker* 340

BUILDING CONTRACTS:

See **CONTRACTS**, 3-7.

BUILDINGS:

Removal by tenant, see **LANDLORD AND TENANT**, 5, 6.

Cost of insurance on as charge on income of estate, see **LIFE ESTATES**, 3, 4.

BURDEN OF PROOF:

To show grounds for attachment, failure to sustain, see **ATTACHMENT**, 1.

To show negligence concurring with act of God as causing accident, see **CARRIERS**, 1.

To show excuse for failure to produce architects' certificate as to completion of building, see **CONTRACTS**, 7.

BURIAL:

Exhumation of body for purpose of reburial, see **DEAD BODIES**.

CANCELLATION OF INSTRUMENTS:

Right of pledgee of stock to cancel subsequent mortgage on assets of corporation, see **CORPORATIONS**, 1-5.

Rescission for fraud in inducing contract, see **EXCHANGE OF PROPERTY**.

Termination of lease, see **LANDLORD AND TENANT**, 4.

Rescission of contract, see **SALES**, 4.

Setting aside tax lien, see **TAXATION**.

Rescission of contracts by vendor or vendee, see **VENDOR AND PURCHASER**.

CANVASS:

Of signatures to initiative petition, see **STATUTES**, 9-14.

CARRIERS:

1. **CARRIERS—INJURIES TO PASSENGERS—CAUSE OF ACCIDENT—ACT OF GOD—CONCURRING NEGLIGENCE—BURDEN OF PROOF.** There is not such a presumption of negligence on the part of a railway company merely from the occurrence of an accident as to render it liable for the death of a passenger on the ground of *res ipsa loquitur*, but the accident was the result of an act of God, placing the burden on plaintiff to show negligence concurring therewith before recovery could be had, where it appears that a passenger train stalled in the mountains was placed on a passing track on a hillside during an unusually severe snowstorm, while efforts were being made to open the track, and that while so located, an avalanche of snow swept down the mountain-side and carried the train one hundred feet from the track, where it was destroyed, killing and injuring the passengers, it further appearing that the hillside above the train sloped at an angle of 30 degrees, and at the time of the accident was covered with from nine to twelve feet of snow, that slides had never occurred before at the place in question, but were known to have occurred along the mountain-side, usually in gullies, and that the railroad had been operated at that place for a period of seventeen years. *Topping v. Great Northern R. Co.*..... 166
2. **SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In such a case, the railroad company is not shown to be guilty of negligence concurring with the act of God in causing the accident from the fact that it adopted the location on the hillside for its roadbed, in failing to construct a snowshed over the passing track or to move the train under snowsheds near the place of the accident, in failing to move the train into a tunnel near at hand or to a spur opposite a flat area, in failing to notify the passengers that it did not intend to, or could not, move the train from the mountain-side to a safe place, in taking the train from the tunnel, where it was safe, and in leaving it on the mountain-side where there was a heavy body of snow, where it appears that the road had been located and operated at the place of the accident for seventeen years, that no slide had ever

CARRIERS—CONTINUED.

occurred there before, that the train was placed on the passing track for the convenience of the passengers, who remained on the train during the blockade and boarded at a hotel nearby, and because it was considered a safe place; that the failure to notify the passengers that the officers did not intend to move the train, or in failing to notify them that it could not move the train to a safer place, was because the officers did not know when the train could be moved: that the company was using every effort to raise the blockade and to provide for the safety and comfort of the train and passengers; that no one could anticipate that a slide would occur; and that the officers of the train exercised their best judgment in placing the train where it was at the time of the accident. *Topping v. Great Northern R. Co.*..... 166

3. **CARRIERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A minor killed by falling from a train is guilty of contributory negligence, precluding recovery in an action for his death, where it was shown that the minor, a boy of fourteen years of age, while a passenger on the train, went upon the lower step of the car at an open vestibule, after a warning to the passengers of the danger of standing between the cars and on the steps and after diligent efforts to keep the vestibule closed, and while standing on the lower steps, indulged in exercises by raising and lowering his body while holding onto the rods at the car entrance, thereby greatly increasing his danger, from which position he fell on being struck by the timbers of a bridge, there being nothing in his appearance to indicate to the train crew that he was not of normal temperament and intelligence. *Rose v. Northern Pacific R. Co.* 684

CERTAINTY:

Of amount due as affecting negotiability of note, see **BILLS AND NOTES**, 4.

CERTIFICATE:

Of facts by trial judge, see **APPEAL AND ERROR**, 5.

Of architect as condition precedent to action on building contract, see **CONTRACTS**, 5-7.

Stock certificate as evidence, see **EVIDENCE**, 3.

CERTIFYING OFFICERS:

Determination of validity of signatures to initiative petitions, see **STATUTES**, 2, 6, 9, 13, 14.

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 3.

1. **CERTIORARI—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL.** Where a cause has been brought before the supreme court both by writ of

CERTIORARI—CONTINUED.

certiorari and appeal, counsel, by stipulation, having submitted the cause for final determination, a disposition of the cause on the appeal is the furnishing of a plain, speedy and adequate remedy, and the certiorari proceedings will be dismissed. *Mills v. Nickens*.. 409

CHARGE:

To jury in civil actions, see TRIAL, 1, 6, 7.

CHATTEL MORTGAGES:

Necessity of findings in action to foreclose, see TRIAL, 9.

1. **CHATTEL MORTGAGES—STOCK OF GOODS—PERMITTING SALES—REDUCTION OF DEBT—VALIDITY.** A chattel mortgage of a stock of goods providing that the mortgagor might reduce said stock of goods as low as \$12,000, but in such event one-half the reduction should be paid to the mortgagee on his note and mortgage, is not void nor fraudulent as to creditors unless given for the purpose of aiding the debtor in defrauding such creditors. *Nason & Co. v. Stack*..... 147
2. **SAME—PROVISION FOR RETENTION OF PROCEEDS—VALIDITY.** The provision permitting the mortgagor to retain one-half the proceeds of sales which reduced the stock to \$12,000 is not shown to have been included for the purpose of defrauding creditors, where the only evidence as to intent of the parties in including the provision in the mortgage was that of the mortgagee, who construed it as meaning that he was to receive one-half the proceeds in case the stock should be reduced to \$12,000, and that the payment of one-half the reduction to the mortgagee would leave ample funds in the hands of the mortgagor to carry on the business and meet current bills; the stock, though reduced, being considered ample in amount for the protection of all parties interested. *Nason & Co. v. Stack*..... 147
3. **SAME—PROCEEDS OF SALE—ACCOUNTING—PAYMENT OF MORTGAGE.** A provision in a chattel mortgage of a stock of goods permitting the mortgagor to reduce its stock as low as \$12,000, but in event of such reduction one-half the proceeds should be paid to the mortgagee on his note and mortgage, does not make the mortgagor the agent of the mortgagee to receive the proceeds of sale for application on the mortgage indebtedness, and thereby require an accounting by the mortgagor and a reduction of the mortgage by one-half the proceeds of such sales whether paid to the mortgagee or not. *Nason & Co. v. Stack*..... 147

CHILD:

See BASTARDS.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

See **ALIENS**.

CLAIMS:

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3-6.
To property subjected to garnishment, see **GARNISHMENT**.
Against city, form of warrant on allowance, see **MUNICIPAL CORPORATIONS**, 37.

COLLISION:

Between automobile and bicycle, see **DEATH**.
With automobile in city street, see **MUNICIPAL CORPORATIONS**, 21-30.

COMMENT:

On evidence by judge, see **TRIAL**, 1.

COMMERCE:

Business of foreign corporation as interstate commerce, see **CORPORATIONS**, 7.

COMMISSIONERS:

Term of office of county commissioners, see **COUNTIES**, 2.

COMMISSIONS:

Right of broker to recover as assignee of co-employee, see **ASSIGNMENTS**, 1, 2.
Of broker, see **BROKERS**, 4-9.
Contract for broker's commissions, see **FRAUDS, STATUTE OF**.

COMMON LAW:

Common law marriages, see **MARRIAGE**.
As rule of decision, see **WATERS AND WATER COURSES**, 1, 2.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**, 1, 2.

COMPENSATION:

Right of broker to recover as assignee of co-employee, see **ASSIGNMENTS**, 1, 2.
Of broker, see **BROKERS**, 4-9.
For performance of contract, see **CONTRACTS**, 8, 9.
For property taken or damaged for public use, see **EMINENT DOMAIN**, 1, 2.
Contracts for broker's commissions, see **FRAUDS, STATUTE OF**.

COMPETENCY:

Of parties to qualify as corporate officers, see **CORPORATIONS**, 6.
Of experts as witnesses, see **EVIDENCE**, 8, 9.

COMPETITION:

In bids for public work, see MUNICIPAL CORPORATIONS, 11.

COMPLAINT:

In civil actions, see PLEADING, 1, 7.

CONCLUSION:

Of witness, see EVIDENCE, 8, 9.

CONCLUSIVENESS:

Of judgment and verdict determining benefits to land at time of creation of diking district, see CONSTITUTIONAL LAW, 1.

Matters concluded by judgment in action for separate maintenance, see DIVORCE, 4, 5.

Of decree of distribution, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Of judgment, see JUDGMENT, 6, 7.

Of action of council upon petition for improvement, see MUNICIPAL CORPORATIONS, 4, 5.

Of determination of local officers certifying initiative petitions, see STATUTES, 6-9, 13, 14.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITION:

Precedent to action, see ARBITRATION AND AWARD.

Precedent to action on building contract, see CONTRACTS, 5, 6.

Precedent to action by pledgee of stock to cancel subsequent mortgage upon corporate property, see CORPORATIONS, 1, 4, 5.

Precedent to action by foreign corporation, see CORPORATIONS, 7.

Precedent to action on contractor's bond, see MUNICIPAL CORPORATIONS, 7.

Precedent to initiation of public improvement, see MUNICIPAL CORPORATIONS, 16.

CONDONATION:

As defense to divorce, see DIVORCE, 2, 3.

CONDUCT:

Of jury ground for new trial, see NEW TRIAL, 1.

Of judge in civil action, see TRIAL, 1.

Of counsel at trial of civil action, see TRIAL, 2.

CONFIRMATION:

Of approval of lieu land selection, see PUBLIC LANDS, 3.

CONFLICT:

Between note and mortgage, see MORTGAGES, 1.

CONSENT:

To assignment of contract, see **ASSIGNMENTS**, 3.

CONSIDERATION:

Admissibility of parol evidence to show, see **EVIDENCE**, 5.

CONSTITUTIONAL LAW:

Taxation of lands outside diking district, see **DRAINS**.

Limitation of public indebtedness, see **MUNICIPAL CORPORATIONS**, 31, 32, 34, 36, 37.

Enactment and validity of statutes, see **STATUTES**.

Subjects and titles of statutes, see **STATUTES**, 15-17.

1. **CONSTITUTIONAL LAW—VESTED RIGHTS—DIKING DISTRICTS—ASSESSMENT OF BENEFITS—JUDGMENT—CONCLUSIVENESS.** 3 Rem. & Bal. Code, § 4107, providing for a redetermination of the question of benefits to lands resulting from the maintenance of dikes, both within and without the district as originally established, is not unconstitutional as authorizing a disturbance of vested rights as determined by the verdict and judgment rendered at the time of the creation of the district; since the original judgment and verdict did not finally determine the amounts which each owner would be required to pay, either for cost of original construction or for maintenance thereafter, and were not strictly judicial in character, but determined only the maximum amount of benefits per acre to be derived by each landowner from the construction of the improvement, as provided by Rem. & Bal. Code, § 4106, and were not conclusive upon the question of benefits to be used as a basis for the levying of future maintenance charges, and the fact that the question of condemnation of land for the construction of the dikes, and the question of benefits resulting to lands within the district to be used as a basis for future levies of the assessment for the cost thereof, are triable in one proceeding by the same court and jury, under Rem. & Bal. Code, § 4106, does not render conclusive the question of benefits at the time of the creation of the district, the same being apart from the question of the award, which pertains strictly to the condemnation proceeding. *State ex rel. Conner v. Superior Court* 480
2. **CONSTITUTIONAL LAW—DUE PROCESS—CONSTRUCTIVE NOTICE IN PROBATE.** The mode of giving notice in probate as provided by statute, although by publication and posting, preliminary to the rendering of orders and decrees, amounts to due process of law, making orders and decrees rendered in pursuance thereof as binding on interested parties as if brought into court by personal notice. *Krohn v. Hirsch* 222
3. **CONSTITUTIONAL LAW—DUE PROCESS—DELINQUENT CHILDREN—UNLAWFUL DETENTION—LIABILITY OF OFFICERS.** Officers who took into

CONSTITUTIONAL LAW—CONTINUED.

custody and detained a minor suspected of being a delinquent, before an attempt was made to comply with the provisions of Rem. & Bal. Code, § 1991, providing for the bringing of delinquent or neglected children before the juvenile court by first filing an information or complaint and the issuance of a summons, are liable in an action for false imprisonment, the detention being a violation of Const., art. 1, § 3, prohibiting the deprivation of liberty without due process of law. *Weber v. Doust* 668

CONSTRUCTION:

Of statute relating to destruction of noxious weeds, see AGRICULTURE.
 Of contract of employment, see BROKERS, 1, 3-5, 8.
 Of contracts, see CONTRACTS, 3, 4.
 Of statute relating to term of office of county commissioners, see COUNTIES, 2.
 Of injunction bond, see INJUNCTION, 2.
 Of statute providing for entry of judgment on verdict, see JUDGMENT, 3.
 Of lease, removal of buildings, see LANDLORD AND TENANT, 5.
 Of agreement for reduction of rent, see LANDLORD AND TENANT, 8.
 Of statute providing for furnishing timbers to coal miners, see MASTER AND SERVANT, 4.
 Of note and mortgage as to time of payment of note, see MORTGAGES, 1.
 Of statute relating to signatures to recall petitions, see MUNICIPAL CORPORATIONS, 1.
 Of statute authorizing transfer of public funds, see MUNICIPAL CORPORATIONS, 33.
 Of grants as affecting title to adjoining submerged lands, see NAVIGABLE WATERS.
 Of act providing for initiation by petition of measure to be submitted to vote of people, see STATUTES, 1, 2, 3, 10, 11, 13, 14.
 Of act relating to department of agriculture, see STATUTES, 19.

CONSTRUCTIVE TRUSTS:

See TRUSTS, 2.

CONTINUANCE:

1. CONTINUANCE—GROUNDS—ABSENCE OF WITNESSES—SURPRISE—DILIGENCE. It is not error to deny motions for a continuance and a new trial on the ground of surprise, caused by testimony of the plaintiff that a marriage was performed by a certain person at a certain place and time and in the presence of certain witnesses, where the allegations in the divorce complaint served upon defendant charged him with notice that such testimony would be given, and he failed to exercise his right to obtain further knowledge of the matters alleged by propounding interrogatories under Rem. & Bal. Code,

CONTINUANCE—CONTINUED.

§§ 1226, 1227, or to have the complaint made more specific in that respect, such neglect amounting to a lack of due diligence on his part. *Potts v. Potts*..... 27

2. **CONTINUANCE—GROUNDS—SURPRISE.** It is not error to deny a continuance upon granting leave to amend the answer, where the amendment pleaded facts within the knowledge of the plaintiffs and which they should have been prepared to meet under the general issue, and it does not appear that prejudice resulted thereby. *Pearson v. Gullans* 57

CONTRACTORS:

Withdrawal of bids before acceptance, see **CONTRACTS**, 2.
 Accrual of action on contractor's bond, see **LIMITATION OF ACTIONS**.
 Default in performance of contract, see **MECHANICS' LIENS**.
 Bonds on public work, see **MUNICIPAL CORPORATIONS**, 7, 8.

CONTRACTS:

See **BILLS AND NOTES**; **CORPORATIONS**; **INDEMNITY**; **INSURANCE**; **SALES**.
 Submission to arbitration, see **ARBITRATION AND AWARD**.
 Assignment, see **ASSIGNMENTS**.
 Of employment, scope of, see **ATTORNEY AND CLIENT**.
 By bank guaranteeing payment of account, see **BANKS AND BANKING**.
 Employment of brokers, see **BROKERS**.
 Parol evidence to vary or explain, see **EVIDENCE**, 5-7.
 Rescission for fraud inducing contract, see **EXCHANGE OF PROPERTY**.
 Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 Separation and property agreement, see **HUSBAND AND WIFE**, 4.
 Leases, see **LANDLORD AND TENANT**.
 For reduction of rent, construction of, see **LANDLORD AND TENANT**, 8, 9.
 Between life tenant and co-executor to use income of estate to pay debts and obligations of devisor, see **LIFE ESTATES**, 1.
 Ground for mechanics' liens, see **MECHANICS' LIENS**.
 For public improvements, see **MUNICIPAL CORPORATIONS**, 6-13.
 Sales of realty, see **VENDOR AND PURCHASER**.

1. **CONTRACTS — EXECUTION — EVIDENCE—SUFFICIENCY.** The evidence sufficiently shows that the owner of a building did not agree with a materialman to pay his account with contractors for material furnished them and used in the building, where he testified that he made no such promise, and he was corroborated by the circumstance that he was protected by a bond, thereby precluding the probability that he would have assumed a responsibility already resting on the contractors and the bonding company. *Farrington v. Morris*.. 400
2. **CONTRACTS — MUTUALITY — OPEN BIDS — WITHDRAWAL BEFORE ACCEPTANCE.** Contractors submitting a bid for construction work under an invitation therefor containing a reservation of the right to re-

CONTRACTS—CONTINUED.

ject any and all bids received, may withdraw the same at any time before acceptance, since the bid was no more than a proposal, and there could be no mutuality or contract relation until the acceptance of the bid. *Seattle Construction & Dry Dock Co. v. Newell*..... 144

3. SAME—AMBIGUITY—CONSTRUCTION—"STEPS" AND "BUTTRESSES"—EVIDENCE—SUFFICIENCY. Where plans and specifications referred to in a subcontract for the stone work in a building provided for buttresses flanking the steps and platforms, the buttresses are not a part of the steps and the contract for cutting the granite for the "granite steps, platforms, and the two granite courses," does not include the cutting of granite for buttresses as well, where the contract was unambiguous in excluding all things not enumerated, and neither the contract nor the specifications contained anything that would tend to indicate that the word "steps" was used in a generic or technical sense, and the evidence failed to show any custom of builders that buttresses are to be considered a part of the steps and assumed to be made of the same material unless otherwise designated in the specifications; but, on the contrary, it was conclusively shown, by expert witnesses, that buttresses were usually made of the same material as the wall against which they abut, rather than of the material used in constructing the steps, and that a contract like the one in question would be construed as not including the cutting of granite for buttresses, and it was further shown that, at the time the plans and specifications were prepared and the contract let, it had not been fully decided that the buttresses should be of granite, there being evidence that an extra bid for cutting granite for the buttresses was subsequently requested. *Washington Monumental & Cut Stone Co. v. Murphy*..... 266
4. CONTRACTS—BUILDING CONTRACTS—PERFORMANCE OR BREACH—CONSTRUCTION. An agreement "to recut all granite now on the building grounds that can possibly be used, and to furnish, cut and deliver on said building grounds all new Spokane granite that may be necessary to complete" certain steps, platforms, and granite courses shown by the plans, is plainly an agreement to recut only such granite then on the grounds as could be used for the purposes stated. *Washington Monumental & Cut Stone Co. v. Murphy*..... 266
5. CONTRACTS—BUILDING CONTRACTS—CONDITIONS PRECEDENT—ARCHITECT'S CERTIFICATE—PLEADING AND PROOF. Where a building contract, as shown by defendants' answer in an action by the contractor to foreclose a lien thereon, provides for a certificate of completion from the architect as a condition precedent to recovery, it is the duty of the contractor to procure the required certificate or show an excuse for failure to do so, and a complaint fails to state a cause of action where it alleges employment under the contract and that the building has been completed, without alleging a demand for the certificate or that the same has been arbitrarily or capriciously withheld, or waived by the owners. *Lindblom v. Mayar*..... 350

CONTRACTS—CONTINUED.

6. SAME—ARCHITECT'S CERTIFICATE—WAIVER. In such a case, the affirmative allegations of the answer, that the building "has never been accepted according to said contract," and a claim for damages resulting from defective construction of the building, do not waive the provision of the contract requiring the architect's certificate as a condition precedent to recovery, the former defense being, in substance, separate from the allegations of damage, and not inconsistent therewith, the defendants offering no evidence in support of the damages alleged, but asserting their right to the architect's certificate both in their pleadings and again in a successful motion for dismissal at the close of the plaintiff's case, thereby precluding the necessity for offering affirmative proof touching the question of damages, resulting in an abandonment of their claim for an affirmative judgment. *Lindblom v. Mayar*..... 350

7. SAME—ARCHITECT'S CERTIFICATE—FAILURE TO PRODUCE—BURDEN OF PROOF. In such a case, the burden of proof is upon the plaintiff, not only as to the merits of his claim, but to show excuse for failure to produce the architect's certificate as to the proper completion of the building. *Lindblom v. Mayar*..... 350

8. CONTRACTS—PERFORMANCE OR BREACH—DEFECTS IN PLANS—PART PERFORMANCE—RECOVERY. Subcontractors may recover from the principal contractor for work done and materials furnished in attempting performance of a contract in exact accordance with defective plans and specifications prepared by the engineer in charge, which rendered performance of the contract impossible; and although the plans and specifications were furnished by the city and not by the principal contractor, in the absence of any warranty by the subcontractors as to the sufficiency of the plans; and there is no implied warranty from the fact that the subcontractors had seen the plans on file with the city and contracted with reference thereto. *Huetter v. Warehouse & Realty Co.*..... 331

9. SAME—ANTICIPATED PROFITS—RECOVERY. In such case, the subcontractors are not entitled to recover profits which could have been realized had the contract been capable of performance. *Huetter v. Warehouse & Realty Co.*..... 331

10. CONTRACTS—BREACH—LOSS OF PROFITS—CONSTRUCTION. In an action for damages for breach of a contract for the removal of rock from defendant's premises, under which plaintiff had the admitted right to do as it pleased with the rock removed, damages for loss of profits cannot be recovered without showing that defendant terminated the contract before a reasonable time for removal of the rock, not that the contract was terminated before a reasonable time for crushing and selling the rock at a profit. *Smith Sand & Gravel Co. v. Corbin*..... 494

CONTRIBUTORY NEGLIGENCE:

- Of passengers, see **CARRIERS**, 3.
- Of servant, see **MASTER AND SERVANT**, 3, 6, 7, 11.
- Of person injured on street, see **MUNICIPAL CORPORATIONS**, 27-29.

CONVEYANCES:

- See **ASSIGNMENTS**; **CHattel MORTGAGES**; **MORTGAGES**.
- Easement in water right, see **WATERS AND WATER COURSES**, 4.

CORPORATIONS:

- See **MUNICIPAL CORPORATIONS**.
- Evidence of official capacity of parties, see **EVIDENCE**, 2.
- Admission of stock certificate as evidence, see **EVIDENCE**, 3.
- Garnishment of to recover award paid in condemnation, see **GARNISHMENT**.
- As trustee of condemnation award paid and received through mis take as to owner, see **TRUSTS**, 1.

1. **CORPORATIONS—STOCK—SALE OF—INVALID MORTGAGE—CANCELLATION—CONDITION PRECEDENT—TENDER.** Where the owner of all the stock of a corporation sold the stock, receiving the first payment in cash, and a note secured by a pledge of the stock as security for the balance of the purchase price, a third party who advanced to the purchaser of the stock the money for the first payment under an agreement that he was to be secured by a lien on all the assets of the corporation purchased, has no remedy against the pledgee, who was not a party to such agreement and who may sue to cancel the mortgage given the third party, since it affected the pledgee's security; and it is not a condition precedent to such action that the mortgagee's advance was not first repaid by the pledgee, his sole remedy being against the parties who defrauded him. *Kneeland Investment Co. v. Berendes*..... 372
2. **SAME—FORECLOSURE OF PLEDGE—RIGHTS OF PLEDGEE.** In such a case, the fact that the pledgee, subsequent to institution of its action to cancel the mortgage, obtained a decree foreclosing the lien of its pledge, under which it purchased the stock for the full amount of its demand, would not alter its position from that of pledgee to that of stockholder in the corporation, and hence destroy its right to relief as a pledgee of the stock, but its right to a cancellation of the mortgage is not affected thereby, the mortgage being an unwarranted invasion of its property rights. *Kneeland Investment Co. v. Berendes* 372
3. **CORPORATIONS—ACTIONS—RIGHTS OF PLEDGEE.** The filing of a mortgage upon the assets of a corporation, after a pledge of all the stock to secure a note given to the owner as part payment of the purchase price, gives an immediate right of action to the pledgee to cancel the mortgage, as it impairs the market value of the stock,

CORPORATIONS—CONTINUED.

hence the complaint is not defective in failing to allege that the mortgagee intended, or was threatening, to foreclose his mortgage. *Kneeland Investment Co. v. Berendes*..... 372

4. CORPORATIONS—ACTIONS—BY PLEDGEE OF STOCK—CONDITION PRECEDENT—SEEKING REDRESS THROUGH OFFICERS. A pledgee of all of the stock of a corporation may maintain an action to cancel a subsequent mortgage upon the corporate property without first seeking redress through the corporation, the rule governing stockholders in such a case having no application to a pledgee of stock; since the pledgee, so far as control of the corporation is concerned, is a stranger thereto. *Kneeland Investment Co. v. Berendes*..... 372
5. SAME—CONDITION PRECEDENT—WAIVER. To first seek redress through the corporation is not a condition precedent in an action against the corporation by a pledgee of the stock to cancel a subsequent mortgage upon the assets of the corporation, where it appears that a request upon the officers of the corporation to bring the action would have been denied. *Kneeland Investment Co. v. Berendes* 372
6. CORPORATIONS—OFFICERS—COMPETENCY—STOCK HELD IN TRUST. A holding of stock in trust for parties is sufficient to enable them to qualify as officers of the corporation. *Kneeland Investment Co. v. Berendes* 372
7. CORPORATIONS — ACTIONS — FOREIGN CORPORATIONS — CONDITIONS PRECEDENT—DOING BUSINESS IN STATE. A foreign corporation is not doing business in this state, within Rem. & Bal. Code, §§ 3714, 3715, requiring the payment of an annual license fee, and providing that no corporation shall maintain any suit or action in any court of the state without alleging and proving payment of its annual license fee last due, although the agent of the corporation maintained offices in this state where he kept samples for exhibition when soliciting orders for the corporation, a manufacturing concern, and it appeared that the agent had made resales of goods shipped to customers, and had, on one occasion, sold his samples when a certain line of stock had been exhausted, which sales were subject to the approval of, and were closed by, the home office, and that the name of the corporation appeared in both the telephone and city directories together with that of the agent as its representative; since the transactions of the agent were only incidental to the regular business of the corporation, which by taking orders through an agent in the state, subject to approval and shipment by the home office, was conceded to be interstate commerce, upon which the state could impose no burden. *Smith & Co. v. Dickinson*..... 465

COSTS:

For destruction of noxious weeds, see AGRICULTURE.

Of defending action as charge against income of estate, see EXECUTORS AND ADMINISTRATORS, 3.

COSTS—CONTINUED.

1. COSTS—TAXATION—WITNESS FEES. Mileage of a witness may be taxed as costs though the witness failed to report attendance to the clerk from day to day as provided by statute, if the witness was called to the stand and testified. *Pearson v. Gullans*..... 57
2. COSTS—WITNESS FEES—TIME FOR TAXATION. A motion to strike a cost bill will be granted as to witness fees not appearing upon the record of the clerk, under Rem. & Bal. Code, § 482, where the cost bill was not filed with the clerk for more than ten days after judgment. *Hayes v. Hutchinson & Shields*..... 394
3. COSTS—ON APPEAL—CROSS-APPEAL. Both parties having appealed, and the judgment having been affirmed, neither can recover costs on appeal. *Modern Irrigation & Land Co. v. Neely*..... 38

COUNCIL:

See MUNICIPAL CORPORATIONS, 4, 5, 12, 13.

COUNTIES:

Easement in highway, see HIGHWAYS, 1.

Assessment of lieu land selections, see TAXATION.

1. COUNTIES—REMOVAL OF COUNTY SEAT—PROCEEDINGS—REVIEW. The submission of a proposition to change a county seat being a political and not a judicial question, alleged error of the county commissioners in their conclusions as to the sufficiency of the petition because of neglect in rejecting names signed thereto, which were alleged to have been later signed to a second petition for the removal of the county seat to another place, will not be reviewed by the courts, except in case of fraud or arbitrary action, in the absence of statute giving the courts jurisdiction of such matters. *Mann v. Wright* 358
2. COUNTIES—COMMISSIONERS — TERM OF OFFICE — STATUTES — CONSTRUCTION—STARE DECISIS. Rem. & Bal. Code, §§ 3869, 3872, providing that, at the biennial election, one county commissioner shall be chosen for four years, does not violate Const., art. 6, § 8, providing that all elections for county officers shall be held biennially, where, for a period of twenty years, following a decision of the supreme court, one commissioner has been elected in each county for a term of four years at each biennial election, and the doctrine then announced and the interpretation placed upon the constitution have since that time been regarded as the law of this state. *State ex rel. Gowan v. Superior Court*..... 18

COUNTY BOARD:

Term of office, see COUNTIES, 2.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.

Condemnation proceedings, see EMINENT DOMAIN, 3.

COURTS—CONTINUED.

- Judgment notwithstanding verdict, see JUDGMENT, 1, 2.
- Submission of cause to trial by jury, see JURY.
- Issuance of writ of mandate, see MANDAMUS.
- Power to order sale in parcels on foreclosure of mortgage, see MORTGAGES, 3.
- Review of questions relating to submission of initiative measures, see STATUTES, 8-14.
- Province of court and jury, see TRIAL, 5.

1. **COURTS—DECISIONS—STARE DECISIS—RULE OF PROPERTY.** A construction placed upon the constitution, resulting in the incurring of numerous obligations on the part of municipalities, which a contrary ruling would render invalid, to the loss of innocent parties, will be adhered to as announcing a rule of property. *State ex rel. Olympia v. Holmes*..... 403
2. **COURTS—JURISDICTION—APPELLATE COURTS—MANDAMUS OR INJUNCTION.** Since the power to enjoin the performance of an act by a public officer is an attribute of a court of original jurisdiction and not of an appellate court, an original writ of mandamus will not be issued by the supreme court to define the duties of the fish commissioner in regard to the collection of license fees and dues for the benefit of the fund for the protection of fish, where the applicants for the writ were only indirectly interested in the collection of such fund by reason of their connection with the fish industry, and so far as they were directly interested, the relief sought against the collection of various fees claimed by the commissioner was injunctive rather than mandatory. *State ex rel. Pacific American Fisheries v. Darwin* 1

COVENANTS:

- Breach of in leases, see LANDLORD AND TENANT, 1, 5.

CREDIBILITY:

- Of witness, see WITNESSES.

CREDITORS:

- Rights as to chattel mortgage by debtor, see CHATTEL MORTGAGES.

CRIMINAL LAW:

- See NUISANCE.

1. **CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL ON MERITS—IDENTITY OF ISSUES.** The dismissing of a prosecution for rape, at the close of plaintiff's case, upon an information filed under Rem. & Bal. Code, § 2436, charging carnal knowledge of a female child between the ages of ten and fifteen years, is a bar to a second prosecution, under Rem. & Bal. Code, § 2435, charging that defendant by force and against her will, and without her consent, had sexual intercourse with a female child above the age of ten years, and about the

CRIMINAL LAW—CONTINUED.

age of fifteen years, since the charge in either information is, in effect, the same, and under which evidence of the same offense might have been admitted, the element of force being immaterial under either statute and under either information. *State v. Dye*. . . . 388

2. SAME—FORMER JEOPARDY — DISMISSAL — WAIVER — EFFECT OF DEFENDANT'S MOTION. The granting of defendant's motion for dismissal after a full hearing of the state's case, and a judgment of dismissal entered, does not constitute a consent to the discharge of the jury or waive his right to plead a former acquittal, the judgment being upon the merits and a bar to a further prosecution, although the proper practice would have been to take a directed verdict. *State v. Dye* 388

3. SAME—FORMER JEOPARDY—RELIANCE ON DIFFERENT DATES. Where the same evidence is admissible under two informations charging criminal liability covering a period of three years, the fact that a different date is relied on to prove the offense under the second information will not preclude a plea of former acquittal under the first information. *State v. Dye*. 388

CROSS-EXAMINATION:

See WITNESSES.

CRUELTY:

Ground for divorce, see DIVORCE, 1.

DAMAGES:

See FALSE IMPRISONMENT, 7.

For loss of profits, on breach of contract, see CONTRACTS, 10.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 1, 2.

For fraud, see FRAUD, 7.

Liability of community for torts of husband, see HUSBAND AND WIFE, 1, 2.

On injunction bond, see INJUNCTION.

Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 14.

For breach of warranty, see SALES, 4.

1. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for injuries to a seaman, thirty-eight years of age, and earning \$80 a month with board, is not excessive, where he suffered a fracture of both bones of the right leg near the ankle, and a dislocation of the knee; he was in the hospital for seven months, where he underwent several operations on account of his injuries, and was, at the time of the trial, twenty-one months after the injury, unable to resume his occupation as a sailor, the medical testimony showing

DAMAGES—CONTINUED.

that the injury would likely prove permanent, and that it would be a year or more before he could resume his former occupation. *Norman v. Alaska Coast Co.*..... 64

2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000 for personal injuries is not excessive where plaintiff, a skilled shingle sawyer, twenty-nine years of age, and capable of earning from \$3.25 to \$4.50 per day, sustained the loss of the fingers of his left hand, which will interfere with the pursuit of his former calling, or any other requiring physical labor with his hands, and the evidence shows that he had not the education or qualifications for employment not involving physical labor. *Woodard v. Cline Lumber Co.* 85

3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$8,500, for injuries sustained through being struck by an automobile, is excessive and will be reduced to \$5,000, where it appears that plaintiff, thirty years of age, suffered slight physical injuries about the back and limbs, possibly causing a retroversion of the womb, was confined to her room about six weeks and suffered a severe nervous shock which has persisted, that she suffers pain along her spine and a tenderness in the abdomen and in the lumbar region of the back, and is anaemic and suffers insomnia, and has no organic trouble, that, at the time of the injury she earned \$15 a week as a tailor's finisher, but at the time of the trial had been out of work for seven months and had spent \$50 for medicine, and that she refused hospital treatment, which would probably have been beneficial. *Mickelson v. Fischer*..... 423

4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000, for personal injuries sustained by a pedestrian struck by an automobile, is not excessive, where plaintiff sustained a fracture of the skull, requiring the entire removal of a portion thereof, and developed epilepsy as a result of the injury, the final result of which is unknown to the physicians. *Moy Quon v. Furuya Co.*..... 526

DEAD BODIES:

1. **DEAD BODIES—BURIAL—REMOVAL.** The court will not order the exhumation of a body for the purpose of reburial in another place, its present resting place being selected by the widow of deceased, although he expressed a wish to be buried in another cemetery, and though title to the burial lot was in dispute, the evidence showing that a stepdaughter, the alleged owner of the lot, made no objection to the body resting in its present grave until more than two years after burial, and that the application for removal was a mere pretext for the exhumation of the body to determine the questioned parentage of deceased's heirs. *State ex rel. Meyer v. Clifford*.. 324

DEATH:

Of minor by fall from moving train, see **CARRIERS**, 3.

Of coal miner through fall of roof in mine, see **MASTER AND SERVANT**, 3, 5.

1. **DEATH—ACTION FOR WRONGFUL DEATH—PROXIMATE CAUSE—QUESTION FOR JURY.** In an action for the death of a minor struck by an automobile while turning a corner on a bicycle, the proximate cause of the accident is for the jury, and defendant's negligence is not established by the physical facts, as a matter of law, from the fact that witnesses' testimony tended to show that certain skid marks in the street and the finding of a box and its contents which were carried on the bicycle showed that the automobile was traveling on the wrong side of the street at the time of the accident, it being a disputed question as to whether the skid marks were made by the defendant's automobile, and there being no admitted physical facts which could control or overthrow the verdict of the jury. *Hiscock v. Phinney* 117

DEBT:

As chargeable to corpus or income of estate, see **EXECUTORS AND ADMINISTRATORS**, 3-6.

Community debts, see **HUSBAND AND WIFE**, 1, 2.

Limitation of public debt, see **MUNICIPAL CORPORATIONS**, 31, 32, 34, 36, 37.

DEBTOR AND CREDITOR:

Arrest of party as absconding debtor, see **ARREST; FALSE IMPRISONMENT**, 1, 2, 7.

DECEDENTS:

Estates, see **EXECUTORS AND ADMINISTRATORS; LIFE ESTATES**.

DECEIT:

See **FRAUD**.

DECISION:

Decisions reviewable, see **APPEAL AND ERROR**, 1.

Of court as rule of property, see **COURTS**, 1.

Common law as rule of, see **WATERS AND WATER COURSES**, 1, 2.

DEEDS:

Substantial compliance with right of way deed in location of road, see **RAILROADS**, 1.

Necessity of tender to put vendee in default, see **VENDOR AND PURCHASER**, 5, 7.

DEFAULT:

Accelerating maturity of note through default of maker as affecting negotiability, see **BILLS AND NOTES**, 2-5.

Of contractor, see **MECHANICS' LIENS**.

In payments by vendee, waiver of, see **VENDOR AND PURCHASER**, 4, 5, 7.

DEFECT:

In plan of work rendering contract impossible of performance, see **CONTRACTS**, 8, 9.

DEFINITENESS:

Of contract for broker's commissions, see **FRAUDS, STATUTE OF**, 1-4.

Of complaint, see **PLEADING**, 1.

Of trial amendment to answer, see **PLEADING**, 6.

DELINQUENT CHILD:

Detention of as deprivation of liberty without due process of law, see **CONSTITUTIONAL LAW**, 3.

DEMAND:

For architect's certificate, pleading and proof, see **CONTRACTS**, 5.

DENIALS:

In pleading, see **PLEADING**, 3.

DEPARTURE:

In pleading, see **PLEADING**, 4, 5.

DEPOSITIONS:

1. **DEPOSITIONS—ANSWERS—SUFFICIENCY.** An objection to depositions for the reason that answers thereto were incomplete, and in certain instances referred to the number of another interrogatory of similar import in which the answer there made was to be the answer to the one in question, is properly overruled, where it appears that the facts can be ascertained from the deposition when read as a whole, and that no attempt was made by the witness to evade the questions or withhold material facts known to him. *Price v. Wetchee Valley Orchards Co.*..... 83

DESCRIPTION:

Of property in broker's contract of employment, see **FRAUDS, STATUTE OF**, 1-3.

Of land by lieu land applicant, see **PUBLIC LANDS**.

DESERTION:

Ground for divorce, see **DIVORCE**, 1.

DETENTION:

Of delinquent child as deprivation of liberty without due process of law, see **CONSTITUTIONAL LAW**, 3.

DETERMINATION:

Of number of valid signatures on initiative petitions, see **STATUTES**, 6-14.

DIKES:

Redetermination of question of benefits to lands from as disturbance of vested rights, see **CONSTITUTIONAL LAW**, 1.

Subject and title of act relating to diking districts, see **STATUTES**, 15.

DILIGENCE:

Want of as defeating right to continuance, see **CONTINUANCE**, 1.

In rescinding contract for fraud, see **EXCHANGE OF PROPERTY**.

To secure newly discovered evidence, see **NEW TRIAL**, 2.

DISABILITIES:

Of allens, see **ALIENS**.

DISCOVERY:

Exhumation of body, see **BASTARDS**; **DEAD BODIES**.

1. **DISCOVERY—EXHUMATION OF BODY—RIGHT TO—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to justify an order for the disinterment of the body of a father to determine his alleged impotency, upon an issue in probate proceedings as to the parentage of children, where it appears that more than two years elapsed after the interment before application was made therefor, and that an examination of the body would, in all probability, fail to establish the facts sought thereby. *State ex rel. Meyer v. Clifford*..... 324

DISCRETION:

Of council in accepting work under contract for public improvement, see **MUNICIPAL CORPORATIONS**, 13.

DISCRETION OF COURT:

Stay of proceedings pending other action, see **ACTION**.

On motion for judgment *non obstante*, see **JUDGMENT**, 1, 2.

Submission of cause to trial by jury, see **JURY**.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 6, 7, 9.

Dismissal on merits as bar to second prosecution, see **CRIMINAL LAW**, 1, 2.

At trial, see **TRIAL**, 3-5.

DISSOLUTION:

Of attachment, see **ATTACHMENT**, 2, 3.

Of community, see **HUSBAND AND WIFE**, 4.

Of partnership, see **PARTNERSHIP**.

DIVERSION:

Of public funds, see MUNICIPAL CORPORATIONS, 32, 33, 36.

Of water course, see WATERS AND WATER COURSES, 3.

DIVORCE:

Separate maintenance, see HUSBAND AND WIFE, 3.

Conclusive effect of former judgment for separate maintenance, see JUDGMENT, 7.

1. **DIVORCE—GROUNDS—ABANDONMENT—CRUELTY.** A divorce will be granted on the ground of abandonment and cruelty, where it appears that the defendant abandoned the plaintiff and did not intend to live with her any more, that he had refused to furnish the necessities of life, and had been cruel and abusive, and such conduct was admitted by the defendant. *Potts v. Potts*:..... 27
2. **DIVORCE—MISCONDUCT—CONDONATION OF OFFENSE.** Condonation being a forgiveness with an implied condition that the offense shall not be repeated, misconduct of a party, long since condoned, will not be removed lightly or upon proof of slight delinquency, where set up as a recriminatory bar in a subsequent action for divorce brought by the offending party. *Rogers v. Rogers*:..... 502
3. **DIVORCE—DEFENSES—RECRIMINATION—CONDONATION OF OFFENSES—EVIDENCE—SUFFICIENCY.** In an action for divorce, the evidence is sufficient to show that matters pleaded in recrimination were condoned by defendant, where it appeared that, after abstracting certain letters from plaintiff's pocket written to him by certain women, one of which implied criminal intimacy with the writer, defendant continued to live with plaintiff and subsequently bore him another child; and other matters testified to by defendant as constituting misconduct on the part of plaintiff, were only capable of such inference by interpreting them in the light of her own construction. *Rogers v. Rogers*:..... 502
4. **DIVORCE—JUDGMENT—MATTERS CONCLUDED.** Where the cause of action in a suit for separate maintenance is the same as that in a subsequent action for divorce, the conclusive effect of a judgment on the merits in the former action is not affected by the joinder of the husband's daughter as a party defendant, on the alleged ground that he had conveyed his property to the daughter in order to defraud the plaintiff. *Loeper v. Loeper*:..... 454
5. **DIVORCE—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED.** A judgment in an action for separate maintenance is *res judicata* in a subsequent action for divorce on the grounds of nonsupport, cruelty, and abandonment, as to all matters occurring before its rendition, where the judgment dismissing the former action showed that defendant had the ability to support his wife, certain real estate being decreed to be his separate property, and necessarily determined that he had not abandoned the plaintiff, and that she was at fault

DIVORCE—CONTINUED.

in living apart from him; since all matters alleged in the divorce action were, or might have been, alleged and litigated in the former action. *Loeper v. Loeper*..... 454

DOCUMENTARY EVIDENCE:

See EVIDENCE, 3.

DOCUMENTS:

As evidence in civil actions, see EVIDENCE, 2, 3.

DRAINS:

Personal liability of commissioners of district on executing indemnity agreement, see INDEMNITY.

Enjoining trespass during construction of drainage ditch, see INJUNCTION.

Subject and title of act relating to diking districts, see STATUTES, 15.

1. **DRAINS—DIKING DISTRICTS—ASSESSMENT OF BENEFITS—PROPERTY LIABLE.** 3 Rem. & Bal. Code, § 4107, providing that when it shall appear to the board of diking commissioners that any lands within or without the district as originally established should be assessed for the purpose of raising funds for future maintenance, or that assessments on land already assessed should be equalized in proportion to benefits received, they shall file a petition in the superior court asking that the original cause be reopened for further proceedings for the purpose of assessing the lands or equalizing the assessments already made, is not unconstitutional as authorizing the diking district to levy taxes on land outside its boundaries, in violation of Const., art. 11, § 12, providing that the legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, but may vest in the corporate authorities thereof the power to assess and collect taxes for such purposes, since it is a special tax levied according to benefits resulting to the land to be charged therewith, and not according to value, as is required in the levying of general taxes; and it is not a violation of legislative power that the tax is imposed by officers in whose election the owners of land have no voice. *State ex rel. Conner v. Superior Court* 480
2. **SAME.** The act, 3 Rem. & Bal. Code, § 4107, is not unconstitutional in that it authorizes the exercise of extra-territorial jurisdiction and enables the taxing of land outside the district which may be within another district, since the charges are measurable only by the benefits resulting to the land charged. *State ex rel. Conner v. Superior Court* 480

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 2.

EASEMENTS:

See HIGHWAYS.

Water rights, see WATERS AND WATER COURSES, 4.

ELECTIONS:

Initiation of measures by petition for submission to vote of people, see STATUTES, 1-14.

EMINENT DOMAIN:

Stay of proceedings pending other action, see ACTION.

Recovery by owners of award wrongfully held by stockholders of corporation, see GARNISHMENT.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 4-20.

Holder of condemnation award paid by mistake as involuntary trustee, see TRUSTS, 1.

1. **EMINENT DOMAIN — DAMAGES — VALUE OF PROPERTY — MEASURE OF DAMAGES.** In condemnation proceedings for a right of way through land possessing little value except for deposits of sand and gravel thereon, the measure of damages to the land not taken is the market value as affected by the taking and not damages based on speculative profits from a gravel plant proposed to be installed at an indefinite future time. *Seattle, Port Angeles & Lake Crescent R. v. Land*.. 206
2. **SAME—DAMAGES TO LAND NOT TAKEN — EVIDENCE — SUFFICIENCY.** In condemnation proceedings for a right of way through 40 acres of land chiefly valuable for its deposits of sand and gravel, findings of the court awarding the owners \$250 for the land taken, but no damages for the land not taken, are sustained by the evidence of witnesses placing the value of the land at from \$20 to \$50 an acre, the property condemned being 2.79 acres, that the land was only valuable for its gravel deposits, and that the construction of the railroad would be a benefit rather than a damage to the land, although appellants' witnesses estimated the damage to the remaining land at from \$3,000 to \$4,000, which was twice the amount paid for the entire tract two years previously, and no showing was made that gravel land had advanced in value in that time, all of appellants' evidence of damage being based on interference with, and loss of speculative profits from, a gravel plant which the owner deemed feasible and which he intended to install at some indefinite future time. *Seattle, Port Angeles & Lake Crescent R. v. Land*..... 206
3. **EMINENT DOMAIN—PROCEEDINGS—REVIEW — APPEAL OR CERTIORARI.** Since the questions arising on the preliminary hearing upon the questions of public use and necessity in condemnation proceedings by public service corporations are questions for the court from which there is no appeal, the method of review being by certiorari, appellants, having failed to review the preliminary order by certiorari, are foreclosed to object that there is no proof of respondents' cor-

EMINENT DOMAIN—CONTINUED.

porate existence, that it is authorized to condemn the land, that it contemplates using the land for railroad purposes, or that it has paid its last annual corporate license. *Seattle, Port Angeles & Lake Crescent R. v. Land*..... 206

EMPLOYEES:

See MASTER AND SERVANT.

ENFORCEMENT:

Of duties of executive officer, see MANDAMUS.

ENGINEERS:

Report of city engineer upon initiation of improvement, see MUNICIPAL CORPORATIONS, 17.

ENTRY:

Of judgment, see JUDGMENT, 3-5.

Of public lands, see PUBLIC LANDS, 2.

EQUITY:

See INJUNCTION; TRUSTS.

Findings in equity case, see TRIAL, 9.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of drains, see DRAINS.

Of highways, see HIGHWAYS, 1.

Of railroads, see RAILROADS, 1.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS; LIFE ESTATES.

ESTOPPEL:

To allege error, see APPEAL AND ERROR, 11-13.

Of bank to set up defense of *ultra vires* in making of guaranty agreement, see BANKS AND BANKING.

To plead statute of frauds, see FRAUDS, STATUTE OF, 5.

By judgment, see JUDGMENT, 6, 7.

By pleading, see PLEADING, 2.

EVIDENCE:

See DEPOSITIONS; DISCOVERY.

Harmless error in rulings on, see APPEAL AND ERROR, 25, 26.

Duty to arbitrate dispute, see ARBITRATION AND AWARD, 2.

Of ratification and consent to assignment of contract, see ASSIGNMENTS, 3.

To sustain grounds for writ of attachment, see ATTACHMENT, 1.

On motion to dissolve attachment, see ATTACHMENT, 3.

Establishment of boundary, see BOUNDARIES.

EVIDENCE—CONTINUED.

- Of negligence concurring with act of God in causing accident to train, see **CARRIERS**, 2.
 - Contributory negligence of passenger, see **CARRIERS**, 3.
 - Of execution of contract, see **CONTRACTS**, 1.
 - In construction of building contract, see **CONTRACTS**, 3.
 - Condonation of offenses, see **DIVORCE**, 3.
 - Condemnation proceedings, see **EMINENT DOMAIN**, 2.
 - Of fraud in procuring distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.
 - In action for unlawful arrest, see **FALSE IMPRISONMENT**, 4.
 - Of fraud, sufficiency, see **FRAUD**, 1-3, 6.
 - Admissibility of in action for fraud inducing exchange of property, see **FRAUD**, 5, 7.
 - Notice of loss insured against, see **INSURANCE**, 2.
 - To show conclusive effect of former judgment, see **JUDGMENT**, 7.
 - Existence of marriage relation, see **MARRIAGE**.
 - Of damage to abutters from negligent prosecution of public improvement, see **MUNICIPAL CORPORATIONS**, 14.
 - Of excessive assessment for improvement, see **MUNICIPAL CORPORATIONS**, 19.
 - Newly discovered as ground for new trial, see **NEW TRIAL**, 2.
 - Adequacy of train service, see **RAILROADS**, 3.
 - As to ownership of goods, after transfer of bill of lading, see **SALES**, 2.
 - Negligence of sheriff in failing to prevent assault on prisoner, see **SHERIFFS AND CONSTABLES**.
 - Of fraud of officers in certifying initiative petitions, see **STATUTES**, 5.
 - Comment on by judge, see **TRIAL**, 1.
 - Questions of fact for jury, see **TRIAL**, 5.
 - Notice of intention to forfeit contracts, see **VENDOR AND PURCHASER**, 6.
 - Testimony of witnesses, see **WITNESSES**.
1. **EVIDENCE—JUDICIAL NOTICE—PUBLIC RECORDS.** The trial court will take judicial notice of an order granting leave to sue upon the official bond of a sheriff, it being a part of the court records. *White v. Jansen* 436
 2. **SAME—BEST AND SECONDARY EVIDENCE—OFFICIAL CAPACITY OF PARTIES.** The admission of testimony of a party that he and another were duly elected and acting officers of a corporation, is not error, on the ground that it was not the best evidence and that the facts could only be shown by the minutes of the meeting at which the election took place, where it was shown that such minutes had actually been kept, but were lost, and that diligent search had failed to locate them; since if deemed secondary evidence, a proper ground was laid for its admission. *Kneeland Investment Co. v. Berendes* 372
 3. **EVIDENCE—DOCUMENTARY EVIDENCE—AUTHENTICATION OF CORPORATE SEAL.** The admission in evidence of a stock certificate cannot

EVIDENCE—CONTINUED.

be assigned as error in that the authenticity of the seal thereon was not proven, where the evidence clearly showed that the certificate bore a seal purporting to be the seal of the company, and that it was issued thereby, and was treated by the company, the officers thereof, and by the officers of a corporation to which it was pledged, as the stock of the company. *Kneeland Investment Co. v. Berendes*... 372

4. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—OFFICIAL CAPACITY OF SIGNERS. An indemnity agreement, unambiguous on its face, showing a personal undertaking on the part of officials signing the same, cannot be varied by parol testimony to show that they intended signing in their official capacity. *Costello v. Bridges*... 192
5. EVIDENCE—PAROL EVIDENCE—CONTRACT—CONSIDERATION. Where a contract for the removal of rock at a stated price per cubic yard specified no time for the removal of the rock, a reasonable time being implied for performance, evidence of a contemporaneous oral agreement that plaintiff would be allowed such time as would be required to crush and dispose of the rock by sale at a profit, is not admissible as showing an additional consideration for the contract, since proof of such consideration would vary or defeat the terms of the written contract. *Smith Sand & Gravel Co. v. Corbin*..... 494
6. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—CONTRACTS—TIME FOR PERFORMANCE. A written contract for the removal of rock at a stated price per cubic yard, but specifying no time for removal, thereby implying a reasonable time within which the work should be performed, cannot be varied by evidence of an oral agreement that such time would be allowed as would be required to crush and dispose of the rock by sale at a profit. *Smith Sand & Gravel Co. v. Corbin* 494
7. EVIDENCE — PAROL EVIDENCE — CONTRACTS — CONTEMPORANEOUS AGREEMENT. Although a contract be considered incomplete so as to admit of parol evidence showing a contemporaneous agreement relating thereto, the evidence to be admissible must not be inconsistent with, or repugnant to, the plain intention of the parties as expressed or implied by the written contract. *Smith Sand & Gravel Co. v. Corbin*..... 494
8. EVIDENCE—OPINION EVIDENCE—REAL ESTATE VALUES—COMPETENCY. Testimony of witnesses who were experienced real estate men though not experienced in the operation of gravel pits, is admissible in condemnation proceedings affecting a gravel pit upon the general question of value and damages. *Seattle, Port Angeles & Lake Crescent R. v. Land*..... 206
9. EVIDENCE—OPINION EVIDENCE—RATE OF SPEED—COMPETENCY. A witness may give his opinion as to the speed at which an automobile was traveling, although he had never owned or operated one or had made tests of speed thereby, the weight of the evidence being for the jury. *Hiscock v. Phinney*..... 117

EXAMINATION:

Of witnesses in general, see **WITNESSES**.
Of expert witnesses, see **EVIDENCE**, 8, 9.

EXCEPTIONS:

For purpose of review, see **APPEAL AND ERROR**, 5.

EXCESSIVE ASSESSMENT:

See **MUNICIPAL CORPORATIONS**, 19.

EXCESSIVE DAMAGES:

See **DAMAGES**.

EXCESSIVE VERDICT:

Duty of judge on motion to reduce, see **TRIAL**, 8.

EXCHANGE OF PROPERTY:

Fraud of broker inducing exchange of properties, see **FRAUD**, 2, 4, 5, 7.

1. **EXCHANGE OF PROPERTY—FRAUD—RESCISSION—WAIVER—LACK OF DILIGENCE.** Rescission will not be allowed plaintiffs, parties to a contract for an exchange of properties, who, after ample time to ascertain alleged fraud inducing the exchange, treated the land as their own and offered it for sale for their own benefit, and several months later brought suit to rescind. *Pearson v. Gullans*. 57

EXECUTION:

Of contract, see **CONTRACTS**, 1.
Liability of community for wrongful levy by husband as sheriff, see **HUSBAND AND WIFE**, 1.

EXECUTORS AND ADMINISTRATORS:

Constructive notice in probate as due process of law, see **CONSTITUTIONAL LAW**, 2.
Debts and obligations as charge against income or corpus of estate, see **LIFE ESTATES**.
Fraud in procuring distribution of property as creating constructive trust, see **TRUSTS**, 2.

1. **EXECUTORS AND ADMINISTRATORS—FINAL DISTRIBUTION—CONCLUSIVENESS—FRAUD—EXTRINSIC OR COLLATERAL—EVIDENCE—SUFFICIENCY.** A final decree of distribution, made upon due notice and unappealed from, decreeing the property to be community property of deceased and his widow and distributing the same to her as sole heir, is final and conclusive on all the world, and will not be set aside at the suit of a claimant more than a year thereafter for alleged fraud in procuring the decree, praying that the property be declared held by defendant as involuntary trustee to the extent of claimant's interest therein, where it appears that claimant, an al-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

leged sister and heir of deceased, had never been a resident of this state, and had no communication with, nor knew the whereabouts of, deceased for a period of seventeen years, but had communication with defendant prior to distribution of the estate, claiming to be a sister and heir of deceased, which defendant denied, that claimant, while having no actual notice of the administration of the estate until sometime after final settlement, had constructive notice thereof given strictly as prescribed by statute, that claimant was not prevented from appearing at the distribution hearing and protecting her alleged rights, nor induced to believe that they would be protected in her absence, but, on the contrary, defendant's acts and communications with claimant were at all times consistent with the course pursued by her in claiming the whole estate during administration thereof, and she at all times dealt at arm's length in opposing the alleged rights of claimant; since defendant's fraud, if any, was involved in the question of defendant's right to take all the property of deceased as his wife and sole heir, and was not extrinsic and collateral to the merits of the matter before the court, but inhered therein and was concluded by the decree. *Krohn v. Hirsch* 222

2. EXECUTORS AND ADMINISTRATORS — FINAL DISTRIBUTION — PERSONS CONCLUDED. A final decree of distribution, made upon due notice and unappealed from, decreeing the property to be community property of deceased and his widow and distributing the same to her as sole heir is final and conclusive, and cannot be attacked more than a year thereafter by one claiming an interest as sister and heir of deceased and that the property was his separate property. *Krohn v. Hirsch* 222
3. EXECUTORS AND ADMINISTRATORS — SETTLEMENT — EXPENSE — COST OF DEFENDING ACTION. An executrix and life tenant, personally interested in a contract, is not to be personally charged with the costs of defending an action on the contract, entered into by her in good faith in the interests of the estate as well as in the interest of the parties to it, where the validity of the contract was debatable, and she exercised her best judgment in making the defense; but the same is properly charged against the income. *Stahl v. Schwartz* 293
4. SAME—INHERITANCE TAX—PAYMENT. Heirs of a life tenant who, with his coexecutor, paid the inheritance tax due the state out of the income of the estate, cannot assert that the sum paid should be charged to the corpus of the estate, upon settlement of the final account of the surviving executrix, the payment having been made voluntarily and with full knowledge of their rights in the premises. *Stahl v. Schwartz*..... 293
5. SAME—BUILDINGS OF ESTATE — PERMANENT IMPROVEMENTS — PAYMENT FROM CORPUS OF ESTATE. The cost of repairs to a building

EXECUTORS AND ADMINISTRATORS—CONTINUED.

made by the executrix of an estate, subject to a life estate in the income, which repairs were of a permanent nature and changed the property from nonincome bearing to income bearing property, is properly charged to the corpus of the estate, the evidence showing that the building will probably inure to the benefit of the remainderman, but failing to disclose any basis upon which an apportionment could be made between the life tenants and the remainderman. *Stahl v. Schwartz* 293

6. **EXECUTORS AND ADMINISTRATORS—DEBTS AND EXPENSES—PAYMENT FROM INCOME OR CORPUS OF ESTATE—RIGHTS OF LIFE TENANT—WAIVER.** Where a life tenant, pursuant to an agreement with his coexecutor, paid claims and expenses of administration in part out of the income and in part out of the corpus of the estate, his heirs cannot question the validity of the payments on the ground that they were properly payable out of the corpus of the estate and should be charged thereto, the life tenant making no claim that he was advancing funds for the use of the estate, or expecting repayment, and it clearly appeared that he was fully advised of his rights to one-half of the income and his administrator's fees, and that he was voluntarily acting as he believed for his best interests. *Stahl v. Schwartz* 293

EXHIBITS:

As part of record, see **APPEAL AND ERROR**, 9.

EXHUMATION:

Of body, see **DEAD BODIES**; **DISCOVERY**.

EXPENSES:

As charge against income or corpus of estate, see **EXECUTORS AND ADMINISTRATORS**, 3, 6.

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 8, 9.

EXTENSION:

Of lease, exercise of option, see **LANDLORD AND TENANT**, 2, 3, 7.

FACTORY ACT:

Complaint in action for injury to servant, see **MASTER AND SERVANT**, 13.

FAILURE OF PROOF:

See **PLEADING**, 7.

FALSE IMPRISONMENT:

Liability of officers for unlawful detention of suspected delinquent, see **CONSTITUTIONAL LAW**, 3.

1. **FALSE IMPRISONMENT—CIVIL LIABILITY—PERSONS LIABLE.** The vice president and manager of a corporation, who united in a bond

FALSE IMPRISONMENT—CONTINUED.

- for the purpose of enabling the corporation to procure the arrest of a party as an absconding debtor, is liable in damages to such party in an action for false imprisonment. *Hayes v. Hutchinson & Shields* 394
2. SAME—CIVIL LIABILITY—JUDGE OF INFERIOR COURT—COLORABLE JURISDICTION. A justice of the peace is not liable for the unlawful arrest of a party as an absconding debtor, under an invalid act, upon process issued by him in good faith, and without malice, the case being colorably, though not really, within his jurisdiction. *Hayes v. Hutchinson & Shields*..... 394
3. FALSE IMPRISONMENT—PROBABLE CAUSE—JUSTIFICATION. The existence of probable cause justifies an officer in making an arrest, even of the wrong person. *White v. Jansen*..... 435
4. FALSE IMPRISONMENT—ACTIONS—EVIDENCE. In an action for false imprisonment, the exclusion of evidence offered to show the details of an investigation relative to the death of plaintiff's sister was proper, where the court ruled that it would admit any evidence tending to show honest belief of defendants that they had the right to arrest plaintiff, or were advised by an officer to do so, and gave wide latitude in admitting any evidence which would show reasons or motive on the part of defendants in taking into custody and detaining plaintiff. *Weber v. Doust*..... 668
5. SAME—PROBABLE CAUSE—ELEMENTS—QUESTION FOR JURY. In an action for false imprisonment, an instruction reciting that "the sole question for you to determine is whether or not in arresting the plaintiff the defendant had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information," sufficiently sets forth the only element of probable cause necessary to be considered by the jury, namely, whether or not the sheriff used due diligence in identifying the plaintiff, it not being claimed upon the trial that the John Doe warrant was not sufficient, or that the description which the sheriff had of the accused did not apply to the plaintiff, it being shown that the sheriff made the arrest after a suggestion from the officer assisting him that plaintiff was not the man wanted, that he had been around the city for a period of 14 years and was well known, and that the sheriff ought to get some evidence of his identification before making the arrest. *White v. Jansen*..... 435
6. SAME—PROBABLE CAUSE—DEFINITION—INSTRUCTIONS. In an action for false imprisonment, the court sufficiently complied with defendant's requested definition that probable cause is "a reasonable ground of suspicion, supported by circumstances, sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty," where the court charged that "the sole question for you to determine is whether or not in arresting the plaintiff the defendant

FALSE IMPRISONMENT—CONTINUED.

had reasonable grounds for believing, and did believe, that the plaintiff had committed the felony charged in the information; if he did have such reasonable grounds for so believing, and did believe . . . he is not liable." *White v. Jansen*..... 435

7. SAME—DAMAGES—MENTAL ANGUISH—ISSUES AND INSTRUCTIONS.

It is not error to instruct, in an action for false imprisonment, that the damages should be compensatory only, that if the jury found that plaintiff has sustained substantial damages, by reason of his imprisonment, they might consider his mental suffering, such as anguish of mind, sense of shame, humiliation, etc., if they should find that they resulted from his imprisonment; and plaintiff's testimony that he felt his arrest as a disgrace to himself and family, warranted the jury in inferring that mental anguish and sense of shame were attributes of his sense of disgrace. *Hayes v. Hutchinson & Shields* 394

FEEs:

Witness fees as costs, see **COSTS**, 1, 2.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 8, 9.

FILING:

Bond on appeal, see **APPEAL AND ERROR**, 2.

Petitions for recall of officers, see **MUNICIPAL CORPORATIONS**, 2.

Notice of lien against contractor's bond, see **MUNICIPAL CORPORATIONS**, 7.

Of statement by proponents of recall, see **OFFICERS**.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 1.

FINDINGS:

Review of on appeal, see **APPEAL AND ERROR**, 16-21.

By court in civil actions, see **TRIAL**, 9.

FISH:

Mandamus to define or enforce duties of fish commissioner, see **COURTS**, 2; **MANDAMUS**.

FOOD:

1. **FOOD—DISEASED MEAT—SALES—ACTIONS—ISSUES.** A complaint alleging that "the defendant negligently and carelessly sold and delivered to plaintiff a certain piece or parcel of poisoned and diseased meat . . . which was then and there unfit for human food, etc," determines the action as one for negligence of defendant in selling diseased meat unfit for human food, and it is error for the court to disregard the allegations of the complaint and instruct the jury that defendant's liability is to be determined under

FOOD—CONTINUED.

the provisions of the pure food act, Rem. & Bal. Code, §§ 5453, 5455, and to read the same to the jury as the law of the case. *Fletcher v. Carstens Packing Co.*..... 241

FORECLOSURE:

Of pledge of stock as affecting right of pledgee to cancel subsequent mortgage on corporate property, see CORPORATIONS, 3.

Of liens, see MECHANICS' LIENS.

Of mortgages, see MORTGAGES, 2, 3.

FOREIGN CORPORATIONS:

See CORPORATIONS, 7.

FORFEITURE:

Right of brokers to retain forfeited deposits on options, see BROKERS, 8.

Of lease for nonpayment of rent, see LANDLORD AND TENANT, 2-4.

By vendor for default in payments, see VENDOR AND PURCHASER, 4-7.

FORMER ACQUITTAL:

As bar to second prosecution, see CRIMINAL LAW.

FORMER ADJUDICATION:

See JUDGMENT, 6, 7.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW.

FRAUD:

See EXCHANGE OF PROPERTY.

Vacation of decree of distribution for fraud, see EXECUTORS AND ADMINISTRATORS, 1.

Liability of community for fraud of husband, see HUSBAND AND WIFE, 2.

As ground for vacation of agreement to dissolve marriage and for division of property, see HUSBAND AND WIFE, 4.

In acceptance of work under contract for improvement, see MUNICIPAL CORPORATIONS, 12, 13.

In initiation of measure for submission to vote of people, see STATUTES, 1, 5.

As creating constructive trust, see TRUSTS, 2.

Sales of realty, see VENDOR AND PURCHASER, 1, 2.

1. FRAUD — MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. Findings that representations inducing the purchase of a relinquishment of a quarter section of land were fraudulent are sustained, where it appears that defendant represented that one hundred and ten acres of the land was good irrigable land, that it could be easily and cheaply irrigated and that there was a well on the land capable of

FRAUD—CONTINUED.

- furnishing water to irrigate over forty acres, when in fact it was conclusively shown that there was not that amount of irrigable land, that the land could not be irrigated from the well, and that the water was insufficient to irrigate any portion of the land, a pump installed by the plaintiff having exhausted the water in one minute and a quarter. *Miller v. Gerry*..... 217
2. FRAUD—MISREPRESENTATIONS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to show fraud on the part of a broker, where it appears that, to induce plaintiffs to make an exchange of properties, he represented that an option contract on land located in a distant state, which was offered as a part consideration for the trade, was a gilt-edged security, that he had investigated the contract and the financial standing of the vendees and that there was no doubt but that the payments under the contract would be made, and that all plaintiffs would have to do would be to collect the principal and interest as it became due, that plaintiffs relied upon the representations of defendant, who was an intimate friend, but later ascertained that the contract would not be met, and that the land was worth considerably less than represented and was mortgaged for nearly its full value. *Scribner v. Palmer*..... 470
3. SAME—RELIANCE ON REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A purchaser of a relinquishment of a quarter section of land is shown to have relied upon false representations made by the owner, and not upon her own observations, as to the character of the soil or amount of water in a well, where, although she visited the land, it was at a time when the ground was frozen and covered with snow, making it impossible to determine the character of the soil or the amount of water, which was represented to be sufficient to irrigate more than forty acres of the land, thereby justifying a reliance upon the statements made. *Miller v. Gerry*..... 217
4. FRAUD—MISREPRESENTATIONS—KNOWLEDGE OF FALSITY—COMPLAINT—SUFFICIENCY. A complaint sufficiently alleges knowledge of the falsity of representations inducing an exchange of real properties, where it alleged that defendant represented that an option contract which plaintiffs were induced to take as part payment for their land had been investigated by him and was first-class, gilt-edged security, that there was no doubt but that the payments would be made as provided in the contract, as the party obligated thereby was abundantly able to make the payments and pay the interest thereon, that by reason of the alleged facts and on account of the intimate relations with defendant and their confidence and belief in his integrity, plaintiffs relied on the representations and consented to make the trade, and paid defendant a commission for his services, when in fact the representations were false and the option contract was worthless as security; since, although the better practice is to charge *scienter* directly, it is sufficient if the facts alleged import knowledge. *Scribner v. Palmer*..... 470

FRAUD—CONTINUED.

5. **SAME—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing an exchange of properties, by reason of misrepresentations of a broker respecting the security of an option contract taken as part payment for the purchase price of plaintiffs' land, a letter and stock certificate sent to plaintiffs some time after their knowledge of the fraud, the letter stating that the stock was given to plaintiffs for the mistake which had been made, are admissible as showing the intimate relation existing between the parties. *Scribner v. Palmer* 470
6. **FRAUD — ACTION FOR DECEIT — EVIDENCE — SUFFICIENCY.** The evidence is sufficient to establish a showing of deceit in carrying out an agreement to furnish motors to plaintiff at the price paid therefor by defendants, which was claimed to be the list price, but which was a price higher than that paid by defendants, although it was shown that plaintiff admitted that he knew, before the trade, that they could be purchased for less than he paid, that the price paid by defendants was stated in a conditional bill of sale which was of record, and that plaintiff's attorney knew the price paid by defendants, where plaintiff testified that, although he heard the motors could be purchased for less money, the defendants made him believe they were paying the full price therefor, and plaintiff was corroborated by two witnesses, and it further appeared that the record of the conditional bill of sale furnished no notice to plaintiff, and the evidence was in conflict as to whether the attorney had communicated his knowledge of the purchase price to plaintiff. *Forsyth v. Dow*..... 137
7. **FRAUD—MISREPRESENTATIONS—DAMAGES—EVIDENCE.** In an action for fraud, brought by vendees against a broker for misrepresenting the value of property conveyed by an option contract which he induced plaintiffs to accept as part payment on a trade of properties, evidence of the market value of the land traded by plaintiffs is admissible, since the plaintiffs are not entitled to the value of their bargain, as they would have been in an action against the vendor, and as against the broker the measure of damages is the actual damages sustained, or the difference in value between the property sold and the contract which plaintiffs took relying on defendant's representations. *Scribner v. Palmer*..... 470

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSION—DESCRIPTION OF PROPERTY.** A written contract to pay a broker's commission on a sale of real estate is void as within the statute of frauds, Rem. & Bal. Code, § 5289, where the property is described as "my timber and sawmill near Dupont . . . land, timber, mill and all," since the description is insufficient to determine the property included in the contract, without resort to parol testimony. *Saika v. Roy* 261

FRAUDS, STATUTE OF—CONTINUED.

2. **FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS—DESCRIPTION OF PROPERTY.** A written contract to pay a broker's commission on a sale of real estate is void as within the statute of frauds, Rem. & Bal. Code, § 5289, where the property is described as "my property, including one hundred and twenty-one acres of land near Ephrata, and appurtenances, water right, water contract with the city of Ephrata, etc., etc.;" since the description cannot be applied to any definite property without resort to parol testimony. *Baylor v. Tolliver*..... 257
3. **SAME—DESCRIPTION—SUFFICIENCY.** A description of property, in a broker's contract of employment, is insufficient if it does not meet the requirements of a sufficient description under any other phase of the statute of frauds, as when invoked in actions for specific performance. *Baylor v. Tolliver*..... 257
4. **FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS—DEFINITENESS.** A contract reciting that each party to an exchange of properties agrees to pay "a commission of two and one-half per cent, or such as agreed upon," is void as within the statute of frauds, since there is no definite basis on which to compute a commission, but merely an agreement for a commission to be subsequently agreed upon. *Houtchens Co. v. Nichols*..... 238
5. **FRAUDS, STATUTE OF—BROKERS—CONTRACT FOR COMMISSIONS—PLEADING—ESTOPPEL.** Commissions retained by brokers, acting under a contract within the statute of frauds, are not recoverable by the owner in an equitable action for an accounting, where it appears that the plaintiff failed to plead the statute, the commissions were earned under an admitted agreement, were retained without objection prior to suit, and were charged against plaintiff in his own statement of the account, his conduct amounting to an estoppel as against a plea of the statute. *Modern Irrigation & Land Co. v. Neely* 38

FRAUDULENT CONVEYANCES:

Mortgage of stock of goods as conveyance in fraud of creditors, see CHATTEL MORTGAGES, 1, 2.

GARNISHMENT:

1. **GARNISHMENT — LIABILITY OF GARNISHEE — EQUITABLE CLAIMS.** Claimants, who were adjudged owners of an award in condemnation paid to a corporation, can recover in garnishment against the stockholders to whom the money was wrongfully distributed, and are not held to a suit in equity to recover therefor. *Smith v. Gruber Lumber Co.*..... 111
2. **GARNISHMENT—PROPERTY SUBJECT—RIGHTS OF DEBTOR AGAINST GARNISHEE—CORPORATIONS—STOCKHOLDERS—IMPLIED TRUST—LIABILITY.** Where an award of \$25,000 for land condemned for a right of way was paid to a lumber company as owner of the land, but on

GARNISHMENT—CONTINUED.

appeal by claimants to the award the judgment was reversed in their favor and against the lumber company for the amount of the award, and the trustees of the company, after paying out \$3,000 of the amount on indebtedness of the company, divided the remaining \$22,000 between stockholders of the company, the claimants can recover the award by garnishment proceedings; since the money was wrongfully paid to the stockholders, being a trust fund to which they had no right, and if regarded as property of the company, was an unlawful reduction of its capital stock, it being the right and duty of the company, whose rights measure those of claimants, to recover the payments made to the stockholders, and account therefor to claimants. *Smith v. Gruber Lumber Co.*..... 111

GRANTS:

Construction of grant as affecting title to adjoining submerged lands, see **NAVIGABLE WATERS**.

Of public lands, see **PUBLIC LANDS**.

Implied grant of easement in use of water conduit, see **WATERS AND WATER COURSES**, 4.

GUARANTY:

See **INDEMNITY**.

Liability of bank under guaranty agreement to pay account, see **BANKS AND BANKING**.

HARBOR AREA:

Levy of assessment on leasehold interest in, see **MUNICIPAL CORPORATIONS**, 15.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 24-29.

HIGHWAYS:

Acquisition of rights in, by prescription, see **ADVERSE POSSESSION**.

1. **HIGHWAYS—ESTABLISHMENT—OPENING AND USER—ABANDONMENT.**
Where a highway was established along a section line but not laid out on the ground, but the line of travel followed the line of least resistance along a route laid out by volunteers, the county acquires an easement in the highway in trust for the public, and can later change the line of travel to the true line, in the absence of circumstances creating an estoppel. *Cunningham v. Weedn.*..... 96
2. **HIGHWAYS—OBSTRUCTIONS—RIGHTS OF ABUTTING LANDOWNER.**
Abutting owners may maintain an action for the removal of an obstruction in a highway. *Cunningham v. Weedn.*..... 96

HOMESTEAD:

Entry on public lands, see **PUBLIC LANDS**, 2.

HORTICULTURE:

Repeal of act relating to horticultural districts, see **STATUTES**, 16, 19.

HUSBAND AND WIFE:

See **DIVORCE**; **MARRIAGE**.

1. **HUSBAND AND WIFE—COMMUNITY DEBTS—TORTS—ACTS IN OFFICIAL CAPACITY.** A judgment rendered against a member of a community, for a wrongful levy made by him while sheriff, is not a community debt, and the community property is not liable therefor. *Day v. Henry*..... 61
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—TORTS—LIABILITY OF WIFE.** Where a married man made a desert entry upon land, and later sold a relinquishment the proceeds of which became community property, his acts in making the sale are those of an agent, and bind the community for a refund of the money in an action for damages for fraud in inducing the sale. *Miller v. Gerry*..... 217
3. **HUSBAND AND WIFE—SEPARATE MAINTENANCE—GROUNDS.** To maintain an action for separate maintenance, it is necessary for plaintiff to show an abandonment without cause, or facts which in law constitute an abandonment, and that, having the ability so to do, the husband neglected or refused to support her. *Loeper v. Loeper* 454
4. **HUSBAND AND WIFE—SEPARATION—PROPERTY AGREEMENT—FRAUD.** An agreement between a husband and wife to dissolve the marriage relation and for a division of property rights, made in contemplation of separation and a subsequent divorce, which occurred, will not be set aside on the ground of fraud on the part of the wife in concealing from the husband her previous improper conduct with another man during the marriage relation, the evidence being insufficient to show positive immoral conduct on the part of the wife. *Krug v. Krug*..... 461

IDENTITY:

Of offenses as affecting former jeopardy, see **CRIMINAL LAW**.

IMPLIED TRUSTS:

See **TRUSTS**, 1.

IMPRISONMENT:

See **FALSE IMPRISONMENT**.

IMPROVEMENTS:

As charge against corpus of estate, see **EXECUTORS AND ADMINISTRATORS**, 5.

On premises demised, right of tenant to remove, see **LANDLORD AND TENANT**, 5, 6.

By life tenant, see **LIFE ESTATES**, 2.

IMPROVEMENTS—CONTINUED.

Assessments for benefits to property subject to life estate, apportionment of, see **LIFE ESTATES**, 5.

Liens, see **MECHANICS' LIENS**.

Public improvements, see **MUNICIPAL CORPORATIONS**, 4-20.

INCOME:

Expenses as charge against income of estate, see **EXECUTORS AND ADMINISTRATORS**, 3-6; **LIFE ESTATES**.

INDEMNITY:

Parol evidence to show official capacity of signers to indemnity agreement, see **EVIDENCE**, 4.

Showing fact of indemnity insurance, by counsel at trial, see **TRIAL**, 2.

1. **INDEMNITY — AGREEMENT — PERSONAL LIABILITY OF OFFICIALS.** An indemnity agreement signed by commissioners of a drainage district, without any mention of the drainage district or their official capacity, made as an inducement for the execution of a surety bond for the protection of landowners from damages occasioned through the construction of a drainage ditch, which recited that "we certify . . . and promise and agree to pay . . . and to keep indemnified the said company, etc." and which followed the application for the bond in which the drainage district was designated as applicant, is a personal undertaking rendering them liable over to the surety company upon judgment being rendered against it. *Costello v. Bridges* 192

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 6.

INDUSTRIAL INSURANCE:

As defense to action for injury to servant, see **MASTER AND SERVANT**, 12.

INHERITANCE TAX:

As charge against income of estate, see **EXECUTORS AND ADMINISTRATORS**, 4.

INITIALS:

Of certifying officer on initiative petition, see **STATUTES**, 3, 5.

INITIATIVE MEASURES:

Canvass of signatures to petitions, see **STATUTES**, 1-14.

INJUNCTION:

Enjoining performance of act by public officer, see **COURTS**, 2.

Enjoining public improvement, see **MUNICIPAL CORPORATIONS**, 15.

1. **INJUNCTION—BONDS—JUDGMENT AGAINST PRINCIPAL—LIABILITY—NOTICE AND OPPORTUNITY TO DEFEND.** A bond given by a surety in an

INJUNCTION—CONTINUED.

- injunction suit, conditioned to pay "all damages that may be awarded against the principal in any action hereafter brought to determine the damages," contemplates an award against the principal by judgment in litigation thereafter prosecuted, and is an undertaking by the surety to abide and perform the judgment, hence the surety is bound thereby though having no notice of suit against the principal, nor opportunity to defend. *Costello v. Bridges*..... 192
2. **INJUNCTION — BONDS — CONDITIONS — CONSTRUCTION — DAMAGES AGAINST PRINCIPAL — "ACTION" — COMMENCEMENT — AMENDMENT OF COMPLAINT.** Where plaintiffs brought an action to restrain a drainage district and its commissioners from trespassing on their lands during the construction of a drainage ditch, and the defendant filed a bond executed by a surety company conditioned that it should pay all damages that might be awarded against it in any action thereafter brought to determine the damages and plaintiffs later, after the commissioners had proceeded with the construction of the work, filed an amended complaint in the injunction suit demanding a money judgment for damages, which was awarded them with costs, the filing of the amended complaint was the bringing of an action within the meaning of the bond, and it was not necessary to institute a new action by service of summons and complaint in order to bind the surety; since the course pursued was no material departure from that contemplated in the bond. *Costello v. Bridges* 192
3. **SAME—EXTENT OF LIABILITY—"ALL DAMAGES."** In such case, liability under the bond cannot be limited to damages suffered subsequent to its execution, where it was clearly intended that the bond should cover all damages awarded resulting from the specified cause. *Costello v. Bridges*..... 192

INSTRUCTIONS:

Harmless error in charge to jury, see **APPEAL AND ERROR**, 27-29.
In civil actions, see **TRIAL**, 1, 6, 7.

INSURANCE:

- Cost of as charge on income of estate, see **LIFE ESTATES**, 3, 4.
Showing by counsel of fact of indemnity insurance, see **TRIAL**, 2.
1. **INSURANCE — ACTIONS — PROOFS OF LOSS — WAIVER—AUTHORITY OF AGENT.** An insurance agent is not authorized to waive proofs of loss under an insurance policy, merely from the fact that he solicited the insurance and delivered the policy to the insured. *Ferdenando v. Milwaukee Mechanics' Insurance Co.*..... 244
2. **SAME—PROOFS OF LOSS—SUFFICIENCY.** Evidence that a local agent requested the insured to come to his office and make proofs of loss, that he did so and was handed a paper which he was told to copy and return, which he did, and was told that it was proofs of loss

INSURANCE—CONTINUED.

and nothing more need be done, is insufficient to show notice of loss to the company, in the absence of a showing of authority on the part of the agent to adjust the loss or waive proof thereof. *Ferdenando v. Milwaukee Mechanics' Insurance Co.*..... 244

3. **SAME—PROOFS OF LOSS—WAIVER—DENIAL OF LIABILITY.** The fact that an insurance company denied liability under a policy is not a waiver of proofs of loss, where the only denial of liability was contained in the answer, after suit brought against the company. *Ferdenando v. Milwaukee Mechanics' Insurance Co.*..... 244

INTENT:

Of legislature to repeal statute, see **STATUTES**, 19.

INTEREST:

Effect as to credibility of witness, see **WITNESSES**.

1. **INTEREST—LIABILITY OF AGENT ON OPEN ACCOUNT—UNLIQUIDATED DEMANDS.** In an action for an accounting against brokers employed to sell lands, under a contract of four years' standing, during which time the account was open and unliquidated, it is proper to allow interest on quarterly balances as determined by expert accountants from the books of both parties, though, as a general rule, interest is not allowed on unliquidated demands, where it appears that demand had been made upon the brokers, from time to time, for an accounting and payment of balances due, with which they failed or refused to comply, and while the owner had made some sales, an accounting to the brokers for these could have been had at any time for the asking; since equity will not deny interest where the balances at any period of the contract were readily ascertainable. *Modern Irrigation & Land Co. v. Neely*..... 38

INTERROGATORIES:

To witnesses, see **DEPOSITIONS**.

INTERSTATE COMMERCE:

By foreign corporations, see **CORPORATIONS**, 7.

JEOPARDY:

Former jeopardy, see **CRIMINAL LAW**.

JUDGES:

Comments on evidence, see **TRIAL**, 1.

Duty to pass upon amount of verdict, on motion to reduce same, see **TRIAL**, 8.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Conclusiveness of judgment determining benefits to land at time of creation of diking district, see **CONSTITUTIONAL LAW**, 1.

JUDGMENT—CONTINUED.

Decisions of courts in general, see COURTS.

In divorce, see DIVORCE, 4; 5.

Decree of distribution of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Dismissal of action with prejudice, see TRIAL, 3.

1. JUDGMENT—NOTWITHSTANDING VERDICT—MOTION FOR—POWER OF COURT. After the entry of a judgment upon the verdict, no motion other than a motion for a new trial or to vacate it can be made or entertained by the court, and it is error to grant a motion for judgment *non obstante veredicto*. *Forsyth v. Dow*..... 137
2. SAME. A motion for judgment notwithstanding the verdict invokes no element of discretion, but will only be granted where the verdict is so contrary to law, or taking the evidence as undisputed, a judgment cannot be entered. *Forsyth v. Dow*..... 137
3. JUDGMENT—ENTRY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 431, providing that the clerk shall immediately enter judgment on the verdict when returned, violates no constitutional provision, as the verdict is received by the court, the entry of the judgment being a ministerial act; hence the judgment should be entered at once, unless the judge reserves judgment or directs that it be not entered. *Forsyth v. Dow*..... 137
4. JUDGMENT—ENTRY—FORM. A judgment is not invalid in that it lacks formality and is not signed by the judge, or where the record does not show that the journal was signed by the judge for the day proceedings were had; since it is not essential that judgments rendered and entered on verdicts be drawn with the formality of other judgments. *Forsyth v. Dow*..... 137
5. JUDGMENT—VACATION—SECOND JUDGMENT. After entry of final judgment on the verdict, the court is without power to enter another until the first is regularly cancelled or set aside; and the first judgment is not vacated by a second judgment making no mention of the first. *Forsyth v. Dow*..... 137
6. JUDGMENT—RES JUDICATA—BAR—MATTERS CONCLUDED. In a prior action on contract in which the issue was as to whether there had been a complete settlement of differences prior to the bringing of the action, and the court found that such was the case, and no appeal was taken therefrom, the judgment therein is *res judicata* and a bar to a subsequent action between the same parties for a recovery upon *quantum meruit*, in which the same issues were involved as in the former action. *Hawkins v. Reber*..... 79
7. JUDGMENT—EVIDENCE—RES JUDICATA. It is competent to prove, in an action for divorce, that the court, upon a former trial of an action by the same plaintiff for separate maintenance, announced before the rendition of judgment, that the evidence clearly showed

JUDGMENT—CONTINUED.

that plaintiff left her home without cause, the question of abandonment being in issue in the divorce case and the defendant pleading the former judgment as *res judicata*. *Loeper v. Loeper*..... 454

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

Sale of property in parcels on foreclosure of mortgage, see MORTGAGES, 2, 3.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR, 1.

Of appellate courts, see COURTS, 2.

JURY:

Disqualification or misconduct ground for new trial, see NEW TRIAL, 1.

Questions for jury in civil actions, see TRIAL, 5.

Instructions in civil actions, see TRIAL, 1, 6, 7.

Verdict in civil actions, see TRIAL, 8.

1. JURY—JURY TRIAL—DISCRETION OF COURT. It is discretionary to submit the cause to a jury after setting it for trial, by consent, as a court case. *Fitzpatrick v. Newland*..... 401

JUSTICES OF THE PEACE:

Liability for unlawful arrest, see FALSE IMPRISONMENT, 2.

JUSTIFICATION:

For making arrest, see FALSE IMPRISONMENT, 3, 5, 6.

KNOWLEDGE:

Of defendant of falsity of representations inducing exchange of properties, see FRAUD, 4.

LACHES:

In rescission of contract of sale, see VENDOR AND PURCHASER, 2.

LAKES:

Title to beds of unnavigable lakes, see WATERS AND WATER COURSES, 1-3.

LANDLORD AND TENANT:

Right of grantees to set up alien ownership in action by assignees of lease from alien, see ALIENS.

Life tenants, see LIFE ESTATES.

Assessment on leasehold interest in harbor area, see MUNICIPAL CORPORATIONS, 15.

LANDLORD AND TENANT—CONTINUED.

1. **LANDLORD AND TENANT—ASSIGNMENT OF LEASE—COVENANTS—MORTGAGE BY LESSEE.** A mortgage by a lessee upon all the buildings and other personal property upon the leased premises is not invalid by reason of a clause in the lease forbidding assignment of the lease except by written permission of the lessor, it being provided that the buildings should belong to the lessee upon termination of the lease. *Oregon-Washington R. & Nav. Co. v. Eastern Oregon Banking Co.* 617
2. **SAME—LEASE—EXTENSION—OPTION TO PURCHASE—TIME FOR EXERCISE.** In such case, the lessee having preserved his rights under the contract by tender of the final installment of rent before declaration or claim of forfeiture by the lessors, his notice of election to extend the lease and purchase the property entitled him to a deed therefor. *Keene v. Zindorf*..... 152
3. **SAME—LEASE—EXTENSION—OPTION TO PURCHASE—TENDER—SUFFICIENCY.** Where the lessee paid the final installment of rent a considerable time after it was due, but preserved his rights under the lease on account of failure of the lessors to declare a timely forfeiture for nonpayment of rent, he is not bound, when tendering the rent, to include therein interest from the time it became due, where several previous payments of rent were made a considerable time after they were due, and were accepted without demand for interest, the parties apparently had no thought of interest or a demand therefor when the tender was made, and no objection was made to the amount thereof, and the lessee's tender, deposited in court for the benefit of the lessors, was more than sufficient to cover interest which might be claimed. *Keene v. Zindorf*..... 152
4. **LANDLORD AND TENANT—LEASE—TERMINATION—NOTICE OF FORFEITURE—NECESSITY.** The rights of a lessee to exercise an option to purchase are not terminated through default in the payment of rent, the last installment of which was due April 1, under a lease providing that, upon nonpayment of the rent or any portion thereof, or within thirty days thereafter, the lessors could elect to forfeit the lease, and that the lessee "waives notice of termination of the lease and all demand for payment of rent or possession," and that the lessee had the option of extending the lease for a period of forty years from September 1, 1913, the end of the original term, at a yearly rental of one dollar, and could elect to purchase the property at any time during the period of extension, provided the election to extend the lease was made, whereupon the lessors would deed the property for a consideration of \$100, where the lessee, before the expiration of the term, though after the final installment of rent became due, tendered sufficient money to pay the rent and also \$100 as the purchase price of the property, at the same time notifying the lessors that he elected to extend the lease and purchase the property, it further appearing that the lessors had never

LANDLORD AND TENANT—CONTINUED.

declared the lease at an end, nor by any overt act indicated an intention to claim a forfeiture for failure to pay the rent when due; since the forfeiture clause in the lease would not automatically terminate the purchaser's rights upon default, in the absence of some declaration or claim of forfeiture on the part of the lessors. *Keene v. Zindorf*..... 152

5. LANDLORD AND TENANT—LEASE—DEPENDENT COVENANTS—REMOVAL OF BUILDINGS—CONSTRUCTION. Where a lease for a term of years, at specified rent payable semi-annually and the payment of taxes, provided that the lessee should erect buildings upon the premises to the value of \$5,000, and that the buildings and improvements then located or to be erected on the premises should belong to the lessee at the termination of the agreement, provided they shall be removed within ninety days, otherwise to belong to the lessor, and further provided that the lease should not be assigned without written permission of the lessor, and that failure of the lessee to keep his covenants should operate as a forfeiture of the lease with right of entry and possession by the lessor, the right of the lessee to remove the buildings is not dependent upon the covenants to pay rent and taxes. *Oregon-Washington R. & Nav. Co. v. Eastern Oregon Banking Co.* 617
6. SAME—IMPROVEMENTS BY TENANTS—RIGHT OF REMOVAL. In such case, the buildings having become the property of the lessee under the terms of the agreement, he had the right to sell or mortgage the same, hence the right to remove the buildings was not personal to the lessee, but passed to a mortgagee who purchased the property upon foreclosure of his mortgage. *Oregon-Washington R. & Nav. Co. v. Eastern Oregon Banking Co.*..... 617
7. SAME—RENT—TIME FOR PAYMENT. Under a lease providing for an extension thereof for a period of 40 years, at the option of the lessee, at a yearly rental of one dollar and the payment of taxes, it was not necessary for the lessee, on electing to extend the lease, to tender the first year's rent, since, in the absence of an agreement to pay in advance, rent is payable at the end of each rental period. *Keene v. Zindorf*..... 152
8. LANDLORD AND TENANT—LEASE—RENT—AGREEMENT FOR REDUCTION—CONSTRUCTION. Where a lease of a hotel for the term of five years provided for certain rentals to be paid in advance on the fifteenth of each month, and a subsequent agreement provided for a refund of a portion of such rent provided the same was paid in advance on the first of the month, and in event of delay in payment no refund would be made, the subsequent agreement was not a substitute for the lease so as to render it a lease for the reduced rental for the remainder of the term, but the reduction was in the nature of a gift, the benefit of which the lessee could obtain only by compliance with the terms of the agreement to make the payments promptly in advance on the first of the month. *Smith v. Schade Brewing Co.*..... 20

LANDLORD AND TENANT—CONTINUED.

9. **SAME.** Disallowance by the lessor of the amount of the agreed refund to the lessee, on failure of the lessee to make the payments promptly on the first of the month, would not amount to the imposition of a penalty, the agreement on the part of the lessor to make the refund being a mere concession. *Smith v. Schade Brewing Co.* 20

LANDS:

See **PUBLIC LANDS.**

LEASES:

See **LANDLORD AND TENANT.**

LEGISLATURE:

Intent of in enactment of statutes, see **STATUTES**, 19.

LIENS:

See **MECHANICS' LIENS.**

Against contractor's bond, time for filing, see **MUNICIPAL CORPORATIONS**, 7.

Cancellation of tax lien, see **TAXATION.**

LIFE ESTATES:

1. **LIFE ESTATES—LIFE TENANT—CONTRACT WITH COEXECUTOR—VALIDITY.** An agreement between a life tenant and his coexecutor to use his share of the income from the estate to pay the debts and obligations of the devisor is not void for want of consideration, but only voidable, and his heirs cannot repudiate consummated transactions thereunder, in the absence of a showing that he was innocent of his rights in the premises. *Stahl v. Schwartz* 293
2. **SAME—IMPROVEMENTS BY LIFE TENANT—PERMANENT REPAIRS.** While a life tenant is only bound to keep the premises in repair, and is under no obligation to undertake improvements, his making of permanent improvements on the estate is presumed to be his voluntary act, and gives him no claim against the reversioner for payment of any part of the cost of the improvement. *Stahl v. Schwartz* 293
3. **SAME—BUILDINGS OF ESTATE—INSURANCE PREMIUMS—PAYMENT FROM INCOME.** The cost of insuring buildings belonging to an estate is properly chargeable to the income of the estate, where the buildings are of immediate benefit to the life tenants, their principal income being derived therefrom, and the evidence shows that their usefulness will not benefit the remainderman, but will, in all probability, be destroyed by the elements before termination of the life tenant's estate. *Stahl v. Schwartz* 293
4. **SAME.** Premiums on insurance policies covering buildings subject to a life estate are properly chargeable to the income thereof,

LIFE ESTATES—CONTINUED.

on the theory that it was the purpose of the testator that the corpus of the estate should remain intact until the termination of the estate for the benefit of the remainderman. *Stahl v. Schwartz*..... 293

5. SAME—STREET IMPROVEMENTS—ASSESSMENTS—PAYMENT FROM INCOME OR CORPUS OF ESTATE. Assessments charged against property subject to a life estate in the income thereof, for benefits from street paving, are properly apportioned between the corpus of the estate and the income, two-thirds to the former and one-third to the latter, where it appears that, while a portion of the improvement is of a permanent nature, the wearing surface will have to be renewed at the end of ten or twelve years, being in the nature of repairs or upkeep and a proper charge on the income, the improvement being forced upon the estate by operation of law and hence not governed by the rule of voluntary improvements; and the fact that part of the improvements affected vacant property producing no income, would not render the corpus of the estate liable for the whole costs thereof, the duty of the life tenant being the same as in the case of income bearing property to conserve the corpus of the estate for the benefit of the remainderman. *Stahl v. Schwartz*..... 293

LIFE TENANTS:

Waiver of rights on voluntary payment of debts and expenses of estate, see EXECUTORS AND ADMINISTRATORS, 6.

LIMITATION:

On time for acquiring title to lands by brokers, see BROKERS, 5.

On public debt, see MUNICIPAL CORPORATIONS, 31, 32, 34, 36, 37.

On authority of secretary of state in canvass of names on initiative petition, see STATUTES, 2, 9-11, 13.

LIMITATION OF ACTIONS:

1. LIMITATION OF ACTIONS—STATUTORY BOND. An action on a bond given to the state by a contractor, as required by Rem. & Bal. Code, § 1159, when work is contracted to be done for the state, county, municipality or other public body, is barred by the statute of limitations, where more than three years elapsed between the accrual of the action and the filing of the complaint. *Kepl v. Fidelity & Deposit Co.* 135

LIEU LANDS:

Taxation of lieu land selections, see TAXATION.

LOANS:

To other funds, effect, see MUNICIPAL CORPORATIONS, 36.

LOCATION:

Of government corners, see BOUNDARIES.

Of railroad, compliance with right of way deed, see RAILROADS, 1.

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1, 2, 7, 10, 13.

MANDAMUS:

Jurisdiction of supreme court to define duties of public officer, see **COURTS**, 2.

1. **MANDAMUS—SUBJECT AND PURPOSES OF RELIEF—GENERAL ENFORCEMENT OF LAWS.** Mandamus does not lie at the suit of private parties to enforce generally the laws relating to collection of fees and dues by the fish commissioner or to compel a general and continuing course of conduct, there being no complaint as to any specific act. *State ex rel. Pacific American Fisheries v. Darwin*..... 1
2. **MANDAMUS—SUBJECT AND PURPOSES OF RELIEF—DEFINING DUTIES OF OFFICER.** Mandamus against the fish commissioner to define his duties will not be entertained although he desires the court to take cognizance of the application, since mandamus does not lie to define the duties of an executive officer. *State ex rel. Pacific American Fisheries v. Darwin*..... 1
3. **MANDAMUS—PARTIES—INTEREST OF RELATOR.** Dealers in fish, cannerymen, trap owners, lessees of traps, fishermen and others engaged in the fishing industry have no such specific interest, differing from that of the public at large, in the collection of the license fees and dues to be paid into the state fund for the protection and propagation of fish, as to entitle them to sue out a writ of mandamus compelling the fish commissioner to collect such fees and dues. *State ex rel. Pacific American Fisheries v. Darwin*..... 1

MARRIAGE:

1. **MARRIAGE—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to prove a ceremonial marriage, where plaintiff's testimony showed that she was regularly married to the defendant at the time and place stated, that she had lived with him for a period of eleven years, that he held her out as his wife during that time, had addressed letters to her as his wife, and that they had lived together as man and wife; such acts creating a presumption of marriage, although a common law marriage be held illegal. *Potts v. Potts*.. 27

MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Liens for labor and materials, see **MECHANICS' LIENS**.

Liability of retiring partner for wages of employee, see **PARTNERSHIP**.

1. **MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED SAW—SCOPE OF EMPLOYMENT.** The claim that plaintiff, a shingle sawyer,

MASTER AND SERVANT—CONTINUED.

who, during the noon hour, placed a new block upon the tipper table, was acting without the scope of his employment, is immaterial in an action for injuries sustained by him through contact with the saw while adjusting a set screw controlling the tipper table after such repairs were made, there being abundant evidence to show that, had the repairs been made by the millwright employed to make needed repairs, the adjustment would have been necessary by the sawyer after the machine was set in motion. *Woodard v. Cline Lumber Co.* 85

2. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE AND APPLIANCES—NEGLIGENCE—QUESTION FOR JURY. In an action by a seaman injured when a winch on which he was standing suddenly started up owing to an alleged defect in a clamp and set screw, the question of the master's negligence in furnishing safe appliances and a reasonably safe place to work is for the jury, where it appears that the servant's position on the "fleeing drum" of the winch was, owing to the crowded condition of the deck, the only practicable way to perform the work in hand, that it was impossible to tell by looking whether the steam operating the winch was on or off, and that while there was testimony to the effect that the winch had been repaired shortly before and was in good repair, other testimony showed such repairs, if made, were not properly made, and that the clamp and set screw, designed to hold the lever in place, were defective. *Norman v. Alaska Coast Co.*..... 64
3. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE—CHANGING CONDITIONS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE. An employee in a mine is not guilty of contributory negligence nor does he assume the risks from changing conditions therein, where, upon discovering signs of a squeeze in the roof of the mine, he quit working at that place, but upon assurance of the foreman that the place was safe, resumed his work, and a few hours later the roof fell, killing the employee. *Lindquist v. Pacific Coast Coal Co.*... 73
4. MASTER AND SERVANT—METHOD OF WORK—TIMBERING MINE—STATUTES—CONSTRUCTION. The owner of a mine is not negligent in failing to provide for cribbing instead of supporting the roof with posts and caps, or from the fact that the timbers furnished were placed two hundred and fifty feet away from the working place, no contention being made that sufficient timbers were not furnished in compliance with Rem. & Bal. Code, § 7394, from which cribs could have been made had the workmen been disposed to so use them, the statute fixing the place of delivery "at the entrance to the working place" and no objection being made that sufficient timber was not in place, it further appearing that the method of timbering the mine had been employed for twenty years, the plaintiffs' evidence going no further than to indicate that, if cribbing had been used, the ac-

MASTER AND SERVANT—CONTINUED.

- cident would not have happened. *Lindquist v. Pacific Coast Coal Co.* 73
5. SAME—METHOD OF WORK—COAL MINING—QUESTION FOR JURY. Whether a coal miner, killed by the falling of the roof in a mine, assumed the risk where the chute on one side of the section in which he was working had caved in and was out of use, and whether it was proper mining to remove the coal from one side of the section to the other so as to leave no natural support for the roof, are questions for the jury, the measure of duty being defined by the statute, and not by the common law. *Lindquist v. Pacific Coast Coal Co.*..... 73
6. SAME—CONTRIBUTORY NEGLIGENCE—UNSAFE METHOD OF WORK—QUESTION FOR JURY. The evidence shows that a servant was not negligent in choosing an unsafe way in performing certain duties, where he chose the only practicable way and the usual and customary one, and that had he chosen an alleged safer way, he would have been unable to perform the work. *Norman v. Alaska Coast Co.*..... 64
7. SAME—METHODS OF WORK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A shingle sawyer is not guilty of contributory negligence, as a matter of law, in attempting to adjust a set screw controlling the tipper table while the machine was in motion, where the evidence was in conflict concerning the location of the set screw with reference to the jointer saw upon which he was injured, and the consequent necessity for a guard, and witnesses testified that the manner in which he attempted to make the adjustment was customary and proper. *Woodard v. Otine Lumber Co.*..... 85
8. SAME—CONCURRING NEGLIGENCE OF FELLOW SERVANT. If the negligence of the master concurs with that of a fellow servant in causing an injury, the master is liable. *Norman v. Alaska Coast Co.* 64
9. SAME—FELLOW SERVANTS—FOREMAN AS VICE PRINCIPAL. In such a case, the foreman, having authority to direct the work in the mine, is a vice principal and not a fellow servant. *Lindquist v. Pacific Coast Coal Co.*..... 73
10. SAME—ASSUMPTION OF RISK. The fact that the servant was an expert winchman, and that the winch was open to examination, would not charge him with negligence, as a matter of law, in stepping upon the "fleeing drum" of the winch without orders to do so, but the question was one for the jury, the servant having run the winch only a short time, had not set the lever, and did not know whether the steam was on or off; since he had a right to assume that the lever and set screw were in proper condition, and that the winch would remain idle until some one set it in motion. *Norman v. Alaska Coast Co.*..... 64
11. SAME—CONTRIBUTORY NEGLIGENCE. Whether the servant was negligent in taking his position on the "fleeing drum" of the winch was a question for the jury. *Norman v. Alaska Coast Co.*..... 64

MASTER AND SERVANT—CONTINUED.

12. SAME—DEFENSES—INDUSTRIAL INSURANCE ACT—COMPLIANCE WITH ACT. It is no defense, in an action for injuries to a servant, that the case falls within the industrial insurance act, where the defendant failed to allege or prove compliance with the act. *Norman v. Alaska Coast Co.* 64
13. MASTER AND SERVANT—INJURY TO SERVANT—FACTORY ACT—PLEADING—COMPLAINT—SUFFICIENCY. In an action by a shingle sawyer, brought under the factory act, for injuries sustained through coming in contact with the jointer saw while adjusting a set screw which controlled the tipper table, the complaint is not defective in that it fails to allege any duty to be performed that would make an injury probable, or that the employee was liable to come in contact with the unguarded saw, where it alleged that "it was one of the duties of the plaintiff to adjust said tipper table to said shingle saw for it to properly perform its work," etc., followed by facts showing the duty to be performed, and that plaintiff was "liable to come in contact" with the edge of the saw while adjusting the set screw which controlled the tipper table. *Woodard v. Ohio Lumber Co.* 85

MATERIALMEN:

Recovery for material sold contractor for use on public improvement, see MUNICIPAL CORPORATIONS, 6, 8, 9.

MATURITY:

Accelerating maturity of note, effect, see BILLS AND NOTES, 2-5.

MEASURE OF DAMAGES:

See DAMAGES.

To land not condemned, see EMINENT DOMAIN, 1.

For fraud of broker in representing value of property, see FRAUD, 7.

MECHANICS' LIENS:

Dismissal of action with prejudice, for failure to obtain architect's certificate, see TRIAL, 3.

1. MECHANICS' LIENS — CONTRACTS — PERFORMANCE — ACCEPTANCE OF WORK. Where plaintiff's assignor agreed with defendant to furnish materials and install a refrigerating plant, and warranted the plant to furnish a specified amount of refrigeration and to work to the satisfaction of defendant, but the plant proved defective and, after repeated effort, any attempt to put it in working order was abandoned, the fact that defendant mortgaged the premises while the plant was being installed and that he later conveyed the premises pending suit to foreclose a lien thereon, did not constitute an acceptance of the work. *United Iron Works v. Hosea*..... 234
2. SAME—DEFAULT OF CONTRACTOR—LIABILITY OF OWNER FOR PARTS USED. Where contractors installed a refrigerating plant under a contract guaranteeing a certain amount of refrigeration and that

MECHANICS' LIENS—CONTINUED.

the plant would work to the satisfaction of the purchaser, but the plant proved defective and all attempts to put it in working order were finally abandoned, the contractors are not entitled to recover the entire purchase price because certain parts of the plant were retained and used by the purchaser in the necessary installation of another plant, but can only recover for the parts retained and used in the installation of the second plant. *United Iron Works v. Hosea* 234

MENTAL ANGUISH:

As element of damage, see FALSE IMPRISONMENT, 7.

METHOD OF WORK:

Unsafe method of work, see MASTER AND SERVANT, 4-7.

MINES AND MINERALS:

Employees in mines, see MASTER AND SERVANT, 3-5, 9.

MINORS:

Detention of suspected delinquent as deprivation of liberty without due process of law, see CONSTITUTIONAL LAW, 3.

MISREPRESENTATION:

See FRAUD.

MISTAKE:

Recovery of money paid and received under mistake as to ownership, see MONEY RECEIVED.

MONEY PAID:

Recovery by vendee on breach of contract, see VENDOR AND PURCHASER, 3.

MONEY RECEIVED:

1. MONEY RECEIVED—LIABILITY—MISTAKE OF FACT. Money belonging to another, though paid and received under a mistaken, though honest, belief as to its ownership, may be recovered in an action for money received. *Smith v. Gruber Lumber Co.* 111

MONUMENTS:

See BOUNDARIES.

MORTGAGES:

Recital in note as to mortgage, as affecting negotiability of note, see BILLS AND NOTES, 1.

Personal property, see CHATTEL MORTGAGES.

Mortgage of corporate stock, see CORPORATIONS, 1-4.

By lessee, see LANDLORD AND TENANT, 1, 6.

MORTGAGES—CONTINUED.

1. **MORTGAGES—NOTES—CONFLICT—TIME FOR PAYMENT—CONSTRUCTION.** A note for \$250, dated September 16, 1908, payable one year after date, is not modified in its terms by the execution of a mortgage on the same day reciting that it was made on consideration that plaintiff should defeat a decree of divorce, and to secure the payment of \$350, according to the terms of two notes made by the mortgagor, one of which is payable to plaintiff "for \$250, due November 1, 1909;" since it is an unconditional promise to pay a fixed sum of money upon a day certain, the mortgage not purporting to postpone the maturity of the note, or to make its maturity contingent upon the event stated in the mortgage; and since the note and mortgage, if not conflicting, will be construed together so that effect may be given to both. *Lovell v. Musselman*..... 477
2. **MORTGAGES—FORECLOSURE—SALE IN PARCELS—PRIORITY OF ADVERSE CLAIMS—ADMISSIONS.** Where mortgagees disclaim any interest in the manner of sale, it is proper, without trying the title, to direct a sale of nine acres of the tract, claimed by one of the defendants under a contract of purchase with the mortgagor prior to the mortgagor's conveyance of the entire tract to the other defendant; since it was the duty of the court to preserve the *status quo* of the parties until the question of priority could be litigated, and no injury would result from the sale. *Black v. Suydam*..... 279
3. **MORTGAGES—FORECLOSURE—SALE IN PARCELS—POWER OF COURT.** Rem. & Bal. Code, §§ 583 and 587, relating to sales of property on execution, and providing that the sheriff shall offer the land for sale as an entirety or in parcels as he shall deem the most advantageous, and that when the property consists of several known lots or parcels they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion is claimed by a third person and he requires it sold separately, such portion shall be sold separately, do not abrogate the equitable power of the court to order a sale in parcels, and in the inverse order of alienation, on the foreclosure of a mortgage covering the entire tract, part of which had been conveyed by the mortgagor to a third party, where the equities of the parties will be subserved thereby, and without impairing the security of the mortgagee. *Black v. Suydam*..... 279

MOTIONS:

- Dissolution of attachment, see ATTACHMENT, 2, 3.
 For judgment *non obstante*, see JUDGMENT, 1, 2.
 Dismissal or nonsuit on trial, see TRIAL, 4.

MUNICIPAL CORPORATIONS:

1. **MUNICIPAL CORPORATIONS—OFFICERS—RECALL—PETITIONS—NUMBER OF SIGNERS—STATUTES—CONSTRUCTION.** Const., art. 1, §§ 33, 34, prescribing the rule for determining the number of signatures to recall petitions, and providing that the number required for recall of of-

MUNICIPAL CORPORATIONS—CONTINUED.

ficers of cities of the first class shall be twenty-five per cent of the votes cast "for his said office to which he was elected at the preceding election," must be construed as meaning the number of votes cast at the next preceding election held for the election of such officer (a councilman), whether the election be the one at which the councilman sought to be recalled was elected or a subsequent election; the words "his office to which he was elected," being considered as a general designation of the office held by him and his associates, the evident purpose of the provision being to determine the question of recall by the required percentage of present qualified voters. *Mills v. Nickens*..... 409

2. SAME—NUMBER OF SIGNERS—TIME OF FILING PETITION. Under Const., art. 1, §§ 33, 34, providing that petitions for the recall of officers of cities of the first class shall contain signatures to the number of twenty-five per cent of the votes cast for all candidates for the office at the next preceding election, the percentage of signatures will be computed upon the vote cast at the election next previous to the time of filing petitions with the city clerk, although formal charges against the officer may have been filed prior to such election. *Mills v. Nickens*..... 409

3. MUNICIPAL CORPORATIONS—OFFICERS—BONDS—LIABILITY OF SURETY. Sureties upon the official bonds of police officers are liable for the unlawful arrest of a minor, where the officers, acting in their official capacity, attempted to perform an official act in the line of their official duties, but in excess of their authority. *Weber v. Doust*.. 668

4. MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—PETITION AND ORDER—CONCLUSIVENESS. A petition for a local improvement not being a jurisdictional requirement, but one subject to waiver and which the legislature could have dispensed with, the legislature had power to provide, by 3 Rem. & Bal. Code, § 7892-19, that the action of the city council upon the sufficiency of the petition shall be final and conclusive. *Redding v. Spokane*..... 263

5. SAME—IMPROVEMENTS—PETITION—SUFFICIENCY. Under 3 Rem. & Bal. Code, § 7892-9, authorizing a city council to pass upon the sufficiency of a petition by which an improvement is initiated, and *Id.*, § 7892-19, making its action in all things conclusive, the passage of an ordinance ordering an improvement is, in effect, a finding that the petition was sufficient. *Redding v. Spokane*..... 263

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—SALE OF MATERIAL TO CONTRACTOR. In an action by a materialman against a town to recover for lumber sold to a contractor to be used in the construction of cross-walks and sidewalks, the court properly held that the sidewalks were built under contract with the town, and not under contract with property owners as alleged by defendant, where it appeared that the town council, after agreement with the contractor to build the cross-walks, allowed and paid a portion of his

MUNICIPAL CORPORATIONS—CONTINUED.

- bill therefor, and afterwards assessed abutting property where the owners had not paid for the cost of sidewalks, and that a portion of the assessments had been paid. *Crab Creek Lumber Co. v. Town of Othello* 52
7. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTOR'S BONDS—ACTIONS—CONDITION PRECEDENT—NOTICE OF LIEN—TIME FOR FILING. The filing of a notice of lien by a subcontractor after completion of his work on a school building, but before formal acceptance by the school board of work under the general contract, is a compliance with Rem. & Bal. Code, § 1161, which fixes thirty days after acceptance as the limit beyond which an effective notice of claim cannot be filed against the contractor's bond; since the statute was intended to fix a limit beyond which the notice of claim cannot be filed, and not a limit before which its filing would be ineffectual. *Washington Monumental & Cut Stone Co. v. Murphy* 266
8. MUNICIPAL CORPORATIONS—IMPROVEMENTS—FAILURE TO TAKE BOND—LIABILITY TO MATERIALMAN—NOTICE. Rem. & Bal. Code, § 1161, providing for notice to a municipality by a creditor of a contractor claiming under a bond taken by the city for the protection of laborers and materialmen, does not apply in an action by the contractor to enforce liability against the city for failure to require the statutory bond. *Crab Creek Lumber Co. v. Town of Othello*... 52
9. SAME—LIABILITY OF CITY—DEFENSES—JUDGMENT AGAINST CONTRACTOR. The fact that the materialman had obtained judgment against the contractor on promissory notes, does not bar recovery in an action against the town for the material furnished, the liability of the town being a statutory one and not affected by the condition of the indebtedness as between the contractor and his creditors. *Crab Creek Lumber Co. v. Town of Othello*..... 52
10. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—PERFORMANCE. There is a substantial compliance with a contract for a public improvement, where it appears that, while the specifications were not, in all things, literally complied with by the contractor, the changes made were by direction of the city engineer and council, the work being done under the supervision and inspection of the city, and that defects complained of were, in the main, caused by fundamental errors in the plan of the work. *Mueller v. Vancouver*.. 384
11. SAME—IMPROVEMENTS—CONTRACT—COMPETITIVE BIDS—USE OF PATENTED ARTICLE. An assessment for a street improvement is not invalid for the reason that the contract for the improvement involved the use of a patented article, as in violation of 3 Rem. & Bal. Code, § 7892-59, providing that contracts for local improvements shall be let upon competitive bids, where the owner of the patent furnished the city a license agreement in which it was agreed that the patented article would be furnished to the successful bidder, without reservation, which was done, and although the license agree-

MUNICIPAL CORPORATIONS—CONTINUED.

- ment provided that it should apply only to contracts for 10,000 square yards or more, while the contract in question was but for 6,650 square yards, it appearing that the bidders relied on the license agreement when submitting their bids, and that no objection was raised to that provision of the contract until the filing of objections to confirmation of the assessment roll. *Great Northern R. Co. v. Leavenworth* 511
12. SAME—ACCEPTANCE OF WORK—FRAUD. The action of the city council in voting to accept work under a contract for a public improvement, at a time when the protesting parties were absent, is not evidence of fraud, nor a sufficient ground for inquiry by the courts as to the motive of the council. *Mueller v. Vancouver*..... 384
13. SAME—ACCEPTANCE OF WORK—FRAUD—DISCRETION—REVIEW. The acceptance of work under a contract for a public improvement, upon substantial compliance therewith by the contractor, in opposition to the opinion of the property owners, does not amount to fraud; and the council having a discretion in such matters, the courts will not review their decision unless it appears that their acceptance was for something not contracted for, or that defects in the work were so apparent that a presumption arises that the city had knowledge of the contractor's nonperformance of the contract. *Mueller v. Vancouver* 384
14. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — NEGLIGENCE—DAMAGE TO ABUTTERS—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show the measure of damages resulting to a building through negligent acts of a city in the construction of a bridge, caused by vibration from the running of machinery and the casting of soot, cinders, and grease upon and against the building, where it falls to show to what extent the damage was increased by the city's negligence beyond that necessarily resulting from a prosecution of the work in a manner free from negligence, there being no attempt to prove the amount of damages resulting from the city's negligence apart from the resulting consequential damages for which the city was not liable. *Hieber v. Spokane*..... 589
15. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—PROPERTY SUBJECT—LEASED HARBOR AREA. An assessment for benefits from a local improvement cannot be levied upon leasehold interests in harbor area leased by the state, in the absence of statutory authority therefor, the laws authorizing the levy of assessments on leasehold interests in tide lands not granting such right; hence the improvement will be enjoined. *North American Lumber Co. v. Blaine*.. 13
16. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENT — ASSESSMENTS—VALIDITY—ENACTMENT OF GENERAL ORDINANCE. An assessment for a public improvement is not invalid for the reason that the proceedings therefor were initiated prior to the passage of a general ordinance covering the matter of local improvements, since 3 Rem. &

MUNICIPAL CORPORATIONS—CONTINUED.

- Bal. Code, § 7892-1 *et seq.*, covering the subject of public improvements in cities and towns, though general and comprehensive in its terms, and directly conferring power upon the city council or legislative body to order improvements and any and all work to be done thereunder, and levy and collect assessments to pay the cost, does not prohibit a city from proceeding with an improvement without first passing a general ordinance, it appearing that each step in the proceedings prior to the passage of the general ordinance was directed by the city council, either by resolution or ordinance. *Great Northern R. Co. v. Leavenworth*..... 511
17. SAME—ENGINEER'S REPORT—DEFECTS—WAIVER—JURISDICTION. Defects in the report of a city engineer upon the initiation of an improvement, in that it failed to show the proportional amount of the cost to be borne by the property, and the lots benefited thereby, as provided by 3 Rem. & Bal. Code, § 7892-10 and the resolution initiating the improvement, are waived by failure to object thereto until hearing upon the assessment roll, and though some of the parties failed to appear in response to the notice and urge objections to the improvement, since the defects were not jurisdictional. *Great Northern R. Co. v. Leavenworth*..... 511
18. SAME—PROCEEDINGS—NOTICE—SUFFICIENCY—WAIVER BY APPEARANCE. An objection by property owners that a notice of hearing upon an assessment roll failed to conform to the statutory requirements is waived, where, in response to the notice, they presented their objections to the roll and were accorded a hearing thereon; since the purpose of the notice was thereby accomplished. *Redding v. Spokane* 263
19. SAME—BENEFITS—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show arbitrary action on the part of eminent domain commissioners in assessing plaintiffs' land for the cost of a public improvement, where it appears that part of an unplatted tract used for school purposes was condemned for a street in order to give other property owners access to the principal thoroughfare, the appellants having access through their property, and that the property was assessed practically 40 per cent of the cost of the improvement, though not benefited for school purposes; and although benefited to some extent as real estate, before it could be sold for residence or business property, it would have to be platted and additional streets opened. *In re West Bertona Street* 125
20. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW. The action of the board of eminent domain commissioners in assessing the benefits to property from a public improvement will not be reviewed in the absence of fraud or arbitrary action, or unless they proceeded upon a fundamentally wrong basis. *In re West Bertona Street*..... 125

MUNICIPAL CORPORATIONS—CONTINUED.

21. MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—DUTY TO STOP, LOOK AND LISTEN—INSTRUCTIONS. It is not error for the court to instruct the jury that a pedestrian is not required to stop, look, and listen when about to cross or when crossing a city street, and that failure to do so does not constitute negligence, but that the pedestrian is bound to use care for his safety commensurate with the attendant circumstances. *Mickelson v. Fischer* 423

22. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—AUTOMOBILES—LAW OF ROAD—INSTRUCTIONS. In an action for the death of a minor through a collision with plaintiff's automobile while riding a bicycle, instructions that the defendant was not necessarily confined to the use of the right-hand side of the street, and that neither the defendant nor deceased had a superior right to the use of the street but that their rights were equal at the place of the accident, are prejudicial, in view of an ordinance requiring vehicles to keep as near the right-hand curb as possible, and the jury should have been instructed that the defendant would be guilty of negligence if they found he was not driving as near the right-hand curb as possible; since, under the ordinance, the boy had a superior right to the use of the right-hand side of the street, and had a right to assume that he would encounter no object traveling in his direction. *Hiscock v. Phinney*..... 117

23. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—AUTOMOBILES—LAW OF ROAD—INSTRUCTIONS. An instruction is not erroneous in that it assumed that appellant had no right to drive his automobile on the left-hand side of the street, since, though having the right to the use of any part of the street, injury resulting from a violation of the law of the road, constitutes negligence *per se*. *Moy Quon v. Furuya Co.*..... 526

24. SAME—LAW OF ROAD—ORDINANCES—VALIDITY. An ordinance requiring vehicles to keep as near the right-hand curb as possible is not in conflict with Rem. & Bal. Code, § 5558, requiring travelers on the highway to turn to the right on meeting; and the ordinance establishes the law of the road within the boundaries of the city. *Hiscock v. Phinney*..... 117

25. SAME—VIOLATING LAW OF ROAD—NEGLIGENCE—PRESUMPTIONS. There is a presumption that defendant was guilty of negligence in driving his automobile on the left-hand side of the street at the time of the accident, in violation of a city ordinance. *Hiscock v. Phinney* 117

26. MUNICIPAL CORPORATIONS—STREETS—USE OF AUTOMOBILES—VIOLATION OF ORDINANCE—NEGLIGENCE. It is negligence *per se* to drive an automobile on a city street at an excessive rate of speed and in violation of an ordinance defining the law of the road as applied to city streets. *Mickelson v. Fischer*..... 423

MUNICIPAL CORPORATIONS—CONTINUED.

27. MUNICIPAL CORPORATIONS — STREETS — NEGLIGENT USE — COLLISION WITH AUTOMOBILE—PROXIMATE CAUSE—INSTRUCTIONS. In an action for personal injuries sustained by a pedestrian struck by an automobile, an instruction is not erroneous in that it failed to tell the jury that, although they should find the defendant guilty of negligence in running down the plaintiff and in approaching the crossing without sounding a bell, gong or horn, it must find such negligence the proximate cause of the injury before plaintiff could recover, where the instruction, while not so advising the jury in terms, was qualified by the statement that plaintiff could not recover if the jury found the injury due to his own contributory negligence. *Moy Quon v. Furuya Co.*..... 526
28. SAME. In such a case, an instruction is not erroneous in failing to tell the jury that violation of the speed ordinance must be found the proximate cause of the accident, where it recited that, if the jury found that plaintiff was injured by the automobile, and that it was driven in excess of the speed ordinance, defendant was guilty of negligence and plaintiff should recover for the injury, unless it was found that his negligence contributed to the injury. *Moy Quon v. Furuya Co.*..... 526
29. SAME—COLLISION WITH AUTOMOBILE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether plaintiff, run down by an automobile, was in the exercise of due care in attempting to cross to the opposite side of the street on alighting from a street car, after looking and seeing no vehicles, and whether defendant was negligent in passing around the rear end of the street car to pass it on the wrong side of the street, are questions for the jury, since plaintiff was not bound to anticipate the approach of vehicles on the wrong side of the street, but had a right to rely on an observance of the law of the road requiring vehicles to travel on the right-hand side of the street, the defendant, however, having a lawful right to the use of the left-hand side of the road if the travel thereon is not such as to make his conduct a source of danger. *Mickelson v. Fischer* 423
30. SAME—LAW OF ROAD—INSTRUCTIONS—APPEAL—HARMLESS ERROR. An instruction, in an action for injuries to a pedestrian struck by an automobile, that "if the defendant, at the time of the injury, was violating an ordinance of the city by being upon the left-hand side of the street and was guilty of negligence, yet if the plaintiff, at the time of the injury was also violating an ordinance of the city by being unlawfully upon the part of the street where the automobile had the prior right, and was guilty of negligence, and the negligence of both plaintiff and defendant was a proximate cause of the injury to plaintiff, then plaintiff cannot recover," is not prejudicially erroneous as charging negligence *per se*, when considered as a whole, the court evidently intending to follow the thought, theretofore expressed, that the defendant might, under proper circumstances, drive

MUNICIPAL CORPORATIONS—CONTINUED.

on the left-hand side of the street, but that he might be guilty of negligence in so doing. *Mickelson v. Fischer*..... 423

31. MUNICIPAL CORPORATIONS—DEBTS—LIMITATIONS — CONSTITUTIONAL PROVISIONS. Where voters authorizing a bonded indebtedness plainly evidenced an intent that the debt so incurred be exclusive of the one and one-half per cent limit authorized by the constitution to be incurred without assent of the voters, and without curtailing the power of the city authorities to incur debts up to that limit, and the bonded indebtedness, while not exceeding the constitutional limit of three and one-half per cent of the assessed value of property within the city at the time the debt was incurred, is now considerably in excess thereof and, together with other debts, incurred by the city without the assent of the voters, constitutes a total indebtedness exceeding the constitutional limit of five per cent of the present assessed value of property within the city, caused by a lower assessed value of property than when the bonded indebtedness was incurred, the city authorities have power to incur indebtedness within the one and one-half per cent limit at any and all times. *State ex rel. Olympia v. Holmes*..... 403
32. MUNICIPAL CORPORATIONS — INDEBTEDNESS — BONDS — DIVERTING FUNDS—VALIDITY. Where a city, in providing for the construction of a municipally owned street railway, to be equipped and operated by an existing railway company on a percentage basis, adopted, by ordinance, a plan to transfer to the special railway fund receipts of the city from percentages paid by street railway corporations as franchise taxes, in case the gross revenues from the operation of the street railway were not sufficient to pay principal or interest on bonds and warrants when due, and limiting the liability of the city to the special fund, the sums so loaned to be repaid out of the gross revenues of the street railway as the same shall accrue, the transfer of a portion of the franchise tax is not the incurring of a municipal indebtedness in violation of the constitutional limitation, but a loan to the special fund under control of the city and which fund has an assured income. *Scott v. Tacoma*..... 178
33. SAME — POWER TO TRANSFER FUNDS — STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 8008, authorizing the common council to create a special fund to defray the cost of a public utility, into which fund the city may be obligated to pay a proportion of the revenues of the city, and to issue interest bearing bonds or warrants payable only out of such special fund, does not limit the fund to receipts from the utility to be created. *Scott v. Tacoma*..... 178
34. MUNICIPAL CORPORATIONS — INDEBTEDNESS — LIMITATION — ASSETS UNPAID TAXES. There being a presumption of payment of delinquent taxes arising from lapse of time, applying alike to real as well as personal taxes, real taxes delinquent for twenty years or more cannot be considered the equivalent of cash assets in determining

MUNICIPAL CORPORATIONS—CONTINUED.

- whether the constitutional debt limit of a city has been exceeded.
Seymour v. Ellensburg..... 365
35. SAME—IMPROVEMENT DISTRICTS — SOLVENCY — PRESUMPTIONS. An improvement district which includes practically all the real property of a city will not be presumed insolvent, and hence in a state of bankruptcy, in the absence of evidence of such fact. *Seymour v. Ellensburg* 365
36. SAME—INDEBTEDNESS—LOANS TO OTHER FUNDS. Temporary loans by a city from the current expense fund to certain local improvement districts and to the water works fund, which were solvent, do not create a debt against the municipality, but may be considered as cash assets and offset against the total indebtedness in determining whether the city has exceeded its constitutional debt limit. *Seymour v. Ellensburg* 365
37. SAME—CLAIMS — ALLOWANCE OF — CITY WARRANTS — FAILURE TO SPECIFY PURPOSE. Rem. & Bal. Code, § 7687, providing that, upon allowance of any demand against the city, "the mayor shall draw a warrant upon the treasurer for the same, which warrant . . . shall specify for what purpose the same is drawn, and out of what fund it shall be paid," is mandatory in its requirements, and a warrant which fails to state on its face the purpose for which it is drawn creates no liability against the city, hence cannot be considered as a valid obligation in determining whether the city has exceeded its constitutional limit of indebtedness. *Seymour v. Ellensburg* 365

MUTUALITY:

Of contract, see CONTRACTS, 2.

NAVIGABLE WATERS:

See WATERS AND WATER COURSES.

1. NAVIGABLE WATERS—RIPARIAN RIGHTS — GRANTS — CONSTRUCTION. The effect of a grant of land on the title to adjoining submerged lands will be determined by the law of the state in which the land lies, the United States assuming the position of a private owner subject to the general law of the state, so far as its conveyances are concerned. *Bernot v. Morrison*..... 538

NECESSITY:

Of notice of forfeiture of lease for failure to pay rent, see LANDLORD AND TENANT, 4.

For confirmation of lieu land selection, see PUBLIC LANDS, 3.

Of request for instructions, see TRIAL, 6.

For findings in equity case, see TRIAL, 9.

Of tender of performance by vendee on rescission of contract, see VENDOR AND PURCHASER, 3.

Of tendering deed, to put vendee in default, see VENDOR AND PURCHASER, 5. 7.

NEGATIVE PREGNANT:

See ATTACHMENT, 2.

NEGLIGENCE:

Of carrier, see CARRIERS, 9.

Measure of damages, see DAMAGES.

Causing death, see DEATH.

Of servant, see MASTER AND SERVANT, 3, 6, 7, 11.

In prosecution of public improvement, see MUNICIPAL CORPORATIONS, 14.

Of person injured on street, see MUNICIPAL CORPORATIONS, 27-29.

In use of city streets, see MUNICIPAL CORPORATIONS, 22-30.

Of sheriff in failing to prevent assault on prisoner, see SHERIFFS AND CONSTABLES.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL, 2.

NEW TRIAL:

Review of order granting new trial, see APPEAL AND ERROR, 10.

1. **NEW TRIAL—GROUNDS—MISCONDUCT OF JURY.** A new trial will be granted for misconduct of the jury, in an action for damages for negligently permitting a fire started by a donkey engine to spread to plaintiff's sawmill, where it appears that the jury, after agreeing upon a verdict for plaintiff, but before arriving at the amount of damages to be awarded, read and discussed a pamphlet purporting to contain the forest protection laws of the state, it not being shown that defendants were connected in any way with the misconduct; since, under Rem. & Bal. Code, §§ 342, 343, the jury are the judges of the facts alone, while it is the duty of the court to decide all questions of law. *Bouton-Perkins Lumber Co. v. Huston*..... 678
2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** A new trial will not be granted for newly discovered evidence which, if given, would only be cumulative, and there was no sufficient showing of diligence to secure the same prior to the close of the trial. *Woodard v. Cline Lumber Co.*..... 85

NONSUIT:

On trial, see TRIAL, 4, 5.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

- To owner of land to destroy noxious weeds, see AGRICULTURE.
- Of appeal, see APPEAL AND ERROR, 3, 4.
- To attorney as binding client, see ATTORNEY AND CLIENT.
- Constructive notice in probate as due process of law, see CONSTITUTIONAL LAW, 2.
- To surety of suit against principal, see INJUNCTION, 1.
- Loss insured against, see INSURANCE, 2.
- Of forfeiture for failure to pay rent, necessity of, see LANDLORD AND TENANT, 4.
- Claim of lien against contractor's bond, see MUNICIPAL CORPORATIONS, 7, 8.
- Hearing on assessment roll for public improvement, see MUNICIPAL CORPORATIONS, 18.
- Of dissolution of partnership, see PARTNERSHIP.
- Of forfeiture by vendor, see VENDOR AND PURCHASER, 6.

NUISANCE:

1. NUISANCE—PLEADING—COMPLAINT—CAPTION—MATERIALITY. There is no defect of parties plaintiff, in an action charging defendant with maintaining a nuisance, because the caption failed to show that the action was brought "upon the relation of the prosecuting attorney" as provided by 3 Rem. & Bal. Code, § 946-2, but the complaint will be held sufficient where the first paragraph recites "Comes now M., deputy prosecuting attorney of Kitsap county, Washington . . . in the name of and by the authority of the state of Washington, complains of said defendant, as follows, to wit, etc;" since the omission is clearly supplied by allegations in the body thereof clearly affixing to plaintiff his representative character. *State v. Knutson* 47

NUMBER:

- Of signers to petition for recall of city officer, see MUNICIPAL CORPORATIONS, 1, 2.

OBJECTIONS:

- To depositions, see DEPOSITIONS.
- To report of engineer on initiation of improvement, see MUNICIPAL CORPORATIONS, 17.

OBSTRUCTIONS:

- Of highways, see HIGHWAYS, 2.

OFFICERS:

- Liability for unlawful detention of suspected delinquent, see CONSTITUTIONAL LAW, 3.
- Corporate officers, see CORPORATIONS, 6.
- County officers, see COUNTIES.

OFFICERS—CONTINUED.

Mandamus to define duties of public officer, see **COURTS**, 2.
 Evidence of official capacity, see **EVIDENCE**, 2.
 Liability for unlawful arrest, see **FALSE IMPRISONMENT**.
 Personal liability on signing indemnity agreement, see **INDEMNITY**.
 Mandamus affecting, see **MANDAMUS**.
 Municipal officers, recall of, see **MUNICIPAL CORPORATIONS**, 1, 2.
 Protection of prisoners, see **SHERIFFS AND CONSTABLES**.
 Determination of validity of signatures on initiative petitions, see **STATUTES**, 1-14.

1. **OFFICERS — RECALL — PETITION—REQUISITES—FILING STATEMENT—SUFFICIENCY.** A statement filed by the proponents of a recall containing merely an itemized statement of receipts and expenditures, with the post office address of the contributors and of those to whom the money was distributed, is not a compliance with 3 Rem. & Bal. Code, § 4940-8, requiring, in addition to the information shown, that the statement shall contain a full, true, and detailed statement of the names and post office addresses of all persons, corporations and organizations who aided or contributed in the preparation of the charge and in the preparation, circulation and filing of the petition, with the amount contributed by each, since the law is aimed at the volunteer as well as the paid worker and requires publicity of all contributing features, and the fact that difficulty attends compliance therewith, does not invalidate the law. *State ex rel. McCauley v. Gilliam* 186

OPINION EVIDENCE:

In civil actions, see **EVIDENCE**, 8, 9.

OPTION:

Right of brokers to retain forfeited deposits on options, see **BROKERS**, 8.
 To purchase leased premises, see **LANDLORD AND TENANT**, 2-4.

ORDERS:

Review of, see **APPEAL AND ERROR**, 1, 10.
 Of public service commission respecting train service, see **RAILROADS**, 4.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 5, 16, 24.

OWNERSHIP:

Money paid under mistake as to ownership, recovery of, see **MONEY RECEIVED**.

PARCELS:

Sale of property in parcels, see **MORTGAGES**, 2, 3.

PARENT AND CHILD:

See **BASTARDS**.

PAROL EVIDENCE:

In civil actions, see **EVIDENCE**, 4-7.

PARTIES:

Right to set up defense of alien ownership of lands, see **ALIENS**.

Entitled to notice of appeal, see **APPEAL AND ERROR**, 3, 4.

Entitled to allege error, see **APPEAL AND ERROR**, 11-13.

Rights and liabilities as to costs, see **COSTS**.

Concluded by decree of distribution, see **EXECUTORS AND ADMINISTRATORS**, 2.

Liable for unlawful arrest, see **FALSE IMPRISONMENT**, 1, 2.

Right to writ of mandate, see **MANDAMUS**, 1, 3.

Sufficiency of complaint as to in action to restrain nuisance, see **NUISANCE**.

Entitled to appeal from decision of secretary of state upon canvass of initiative petitions, see **STATUTES**, 12.

Trustees, see **TRUSTS**.

PARTNERSHIP:

1. **PARTNERSHIP—RETIREMENT OF PARTNER—LIABILITY—NOTICE.** A retiring partner is liable for the wages of an employee who entered upon employment prior to dissolution of the partnership, in the absence of notice of dissolution, or knowledge of facts sufficient to charge notice or impose the duty of making inquiry. *Egholm v. Williams* 609

PASSENGERS:

Carriage of, see **CARRIERS**.

PAVEMENT:

Of streets, see **MUNICIPAL CORPORATIONS**, 11.

PAYMENT:

See **CHATTEL MORTGAGES**, 3.

Bill of exchange or promissory note, see **BILLS AND NOTES**, 2-5.

Claims against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3-6.

Of rent, time for, see **LANDLORD AND TENANT**, 7.

Of claims against estate from income, see **LIFE ESTATES**.

Recitals in mortgage as affecting time for payment of note, see **MORTGAGES**, 1.

Waiver of default in payments by vendee, see **VENDOR AND PURCHASER**, 4-7.

PENALTIES:

For failure to pay rent promptly, see **LANDLORD AND TENANT**, 9.

PENDENCY OF ACTION:

Stay pending other action, see ACTION.

PERFORMANCE:

By broker as assignee of co-employee, see ASSIGNMENTS, 2.
 Of contract by brokers, see BROKERS, 5, 7.
 Of contract, see CONTRACTS, 4, 8, 9; MECHANICS' LIENS, 1.
 Of contract for public improvement, see MUNICIPAL CORPORATIONS, 10.
 Substantial compliance with deed in location of road, see RAILROADS, 1.
 Of contract, tender by vendee on rescission, see VENDOR AND PURCHASER, 3.

PERSONAL INJURIES:

To passenger, see CARRIERS.
 Damages for, see DAMAGES.
 To employee, see MASTER AND SERVANT.
 To person on city street, see MUNICIPAL CORPORATIONS, 21-30.
 Showing fact of indemnity insurance, see TRIAL, 2.
 Cross-examination of witnesses in action for, see WITNESSES.

PETITION:

For removal of county seat, see COUNTIES, 1.
 For recall of councilman, see MUNICIPAL CORPORATIONS, 1, 2.
 For public improvement, see MUNICIPAL CORPORATIONS, 4, 5.
 For recall of officers, see OFFICERS.
 For initiation of measure to be submitted to vote, see STATUTES, 1-14.

PLANS:

Defective plans rendering contract impossible of performance, see CONTRACTS, 8, 9.

PLEADING:

See ATTACHMENT, 2.
 Amendment of on appeal, see APPEAL AND ERROR, 14, 15.
 Amendment of as ground for continuance, see CONTINUANCE, 2.
 In action on building contract, see CONTRACTS, 5, 6.
 In action for negligent sale of diseased meat, see FOOD.
 Alleging knowledge of falsity of representations inducing exchange of properties, see FRAUD, 4.
 Statute of frauds, see FRAUDS, STATUTE OF, 5.
 On injunction bond, see INJUNCTION, 2.
 Complaint under factory act, for personal injuries, see MASTER AND SERVANT, 13.
 In action to restrain nuisance, see NUISANCE.

1. PLEADING—COMPLAINT—DEFINITENESS. In an action to enjoin interference with the bed of a lake, in which the state intervened, claiming ownership, it was proper, on motion therefor, to require

PLEADING—CONTINUED.

the complaint in intervention to be made more specific with reference to the character of the lake, it having failed to allege whether it was navigable or not, even though the state might claim the bed of the lake under either condition, since by failure to allege either condition, there was, in effect, a plea of contradictory facts, violating the code rule that the complaint shall contain a plain and concise statement of facts constituting the cause of action. *Bernot v. Morrison* 538

2. PLEADING—ANSWER—INCONSISTENT DEFENSES — ESTOPPEL. Where an answer in an action on a broker's contract of employment, admitted an assignment by one broker of his interest under the contract to the other broker, but denied approval and ratification as alleged in the complaint, and as separate defenses, alleged abrogation of the contract and a full settlement of differences thereunder, and a breach of the contract and a demand for damages, the plea of settlement and demand for damages are not inconsistent defenses, since neither is necessarily false, and hence do not estop the defendant to deny approval and ratification of the assignment. *Lord v. Wapato Irrigation Co.*..... 561
3. PLEADING—ANSWER—DENIAL ON INFORMATION. A denial on information and belief of an allegation that leave had been obtained by order of the superior court to sue upon the official bond of a sheriff is insufficient, as the order was a public document. *White v. Jansen* 435
4. PLEADING—REPLY—DEPARTURE. There is no departure between the amended complaint and the reply, in an action by a materialman for lumber sold to a contractor to be used in building sidewalks, where the complaint alleged the building of the sidewalks under contract with the town, while the reply alleged acts of the town relied upon as showing an arrangement between the town and the contractor for the building of the walks which would in law be in effect a contract though none had formally been entered into, there being no abandonment of the cause of action as pleaded. *Crab Creek Lumber Co. v. Town of Othello*..... 52
5. PLEADING—DEPARTURE—REPLY. In an action for brokers' commissions, the reply does not constitute a departure, where the action was founded upon an original contract, the complaint alleging a purchase price of \$150,000 on which the plaintiffs claimed commissions, and, the defendants having answered setting up a subsequent contract as a substitute for the original, with facts tending to show nonperformance, the reply, while admitting the subsequent contract, alleged that it was only partially set out in the answer and that it was supplemental and in addition to the original contract authorizing the plaintiffs to recover \$5,000 additional; since the reply was not an abandonment of the original cause stated in the complaint or an attempt to recover upon an inconsistent cause

PLEADING—CONTINUED.

of action, even if plaintiffs misconceived the effect of the supplemental contract; the pleadings as a whole presenting the entire issue and warranting recovery to the extent of the proof, regardless of the amount claimed. *Duncan v. Parker*..... 340

6. **PLEADING—TRIAL AMENDMENT—DEFINITENESS—PREJUDICE.** A trial amendment of the answer is not indefinite and uncertain if sufficient to apprise plaintiffs of defenses relied on; the facts pleaded being within their knowledge, and, in effect, proven by calling one of them to the stand. *Pearson v. Gullans*..... 57

7. **PLEADINGS—AMENDMENTS—VARIANCE OR FAILURE OF PROOF.** Where a complaint is founded on an express contract of sale and the evidence discloses an express contract of consignment, there is an entire failure of proof, and hence the complaint cannot be amended to conform to the proofs, as is permissible in case of a variance. *Hubenthal v. Creighton*..... 688

PLEDGES:

Of corporate stock, see CORPORATIONS, 1-5.

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.

POWERS:

Of court to grant judgment *non obstante*, see JUDGMENT, 1, 2.

Of court to order sale of land in parcels, see MORTGAGES, 3.

Of secretary of state upon canvass of signatures to initiative petitions, see STATUTES, 2, 9-11, 14.

PRACTICE:

See APPEAL AND ERROR; CERTIORARI; COSTS; DAMAGES; EVIDENCE; JUDGMENT; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 24-29.

Dismissal of action with prejudice, see TRIAL, 3.

PREMIUMS:

On insurance policies as charge on income of estate, see LIFE ESTATES, 3, 4.

PRESUMPTIONS:

As to marriage, see MARRIAGE.

As to negligence, in violating law of road, see MUNICIPAL CORPORATIONS, 25.

PRESUMPTIONS—CONTINUED.

As to insolvency of improvement district, see **MUNICIPAL CORPORATIONS**, 35.

As to ownership of goods from transfer of bill of lading, see **SALES**, 2.

On acceptance of goods sold, see **SALES**, 3.

PRINCIPAL AND AGENT:

See **BROKERS**.

Attorney as general agent imputing notice to client, see **ATTORNEY AND CLIENT**.

Mortgagor as agent of mortgagee in applying proceeds of sale of goods on mortgage indebtedness, see **CHATTEL MORTGAGES**, 3.

Insurance agents, see **INSURANCE**, 1.

Liability of agent for interest, on open account, see **INTEREST**.

PRINCIPAL AND SURETY:

See **INDEMNITY**.

Liabilities of sureties on bonds in legal proceedings, see **INJUNCTION**.

Liabilities of sureties on bond for performance of duties of trust or office, see **MUNICIPAL CORPORATIONS**, 3.

PRIORITIES:

Of adverse claims to mortgaged property, see **MORTGAGES**, 2.

Of settler's rights over lieu land selections, see **PUBLIC LANDS**, 2.

PRISONERS:

Assault on prisoner by inmates of jail, see **SHERIFFS AND CONSTABLES**.

PROBABLE CAUSE:

For making arrest, see **FALSE IMPRISONMENT**, 3, 5, 6.

PROBATE:

Constructive notice in probate as due process of law, see **CONSTITUTIONAL LAW**, 2.

Exhumation of body to determine alleged impotency, upon issue as to parentage of children, see **DISCOVERY**.

Fraud in procuring distribution of property as creating constructive trust, see **TRUSTS**, 2.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 3, 4.

PROFITS:

Right to recover anticipated profits, see **CONTRACTS**, 9.

Damages for loss of, on breach of contract, see **CONTRACTS**, 10.

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROOF:

Of loss insured against, see **INSURANCE**.

PROPERTY:

Adverse possession, see **ADVERSE POSSESSION**.

Rights of aliens to take title to, see **ALIENS**.

Taking or damaging for public use, see **EMINENT DOMAIN**.

Description of in broker's contract of employment, see **FRAUDS, STATUTE OF, 1-3**.

Subject to garnishment, see **GARNISHMENT**.

Community property, see **HUSBAND AND WIFE, 1, 2**.

Protection of rights of property by injunction, see **INJUNCTION**.

Assessment of for benefits from improvement, see **MUNICIPAL CORPORATIONS, 15-20**.

Subject to taxation, see **TAXATION**.

PROVINCE OF COURT AND JURY:

In civil actions, see **TRIAL, 5**.

PROXIMATE CAUSE:

Of accident, see **DEATH**.

Of injury from collision with automobile, see **MUNICIPAL CORPORATIONS, 27, 28, 30**.

PUBLIC DEBT:

See **MUNICIPAL CORPORATIONS, 31-37**.

PUBLIC IMPROVEMENTS:

Accrual of action on contractor's bond, see **LIMITATION OF ACTIONS**.

By municipalities, see **MUNICIPAL CORPORATIONS, 4-20**.

PUBLIC LANDS:

Taxation, see **TAXATION**.

1. **PUBLIC LANDS—GRANTS—LIEU LAND SELECTIONS—UNSURVEYED LANDS—DESCRIPTIONS—SUFFICIENCY.** Under 30 U. S. Stat. at Large, 36, authorizing lieu land selections in place of *bona fide* claims or patented lands included within the limits of a public forest reservation and relinquished to the government, the lands selected, if within the unsurveyed portion of the public domain, must be described by metes and bounds with reference to natural monuments so that they can be identified, and it is not sufficient to describe them by the government subdivisions which it is expected will apply when the government survey is extended. *Bird Timber Co. v. Snohomish County* 416
2. **SAME—GRANTS—UNSURVEYED LANDS—RIGHTS OF SETTLERS—PRIORITY OVER LIEU LAND SELECTIONS.** Under 21 U. S. Stat. at Large, 140, making vacant unsurveyed public lands subject to settlement by

PUBLIC LANDS—CONTINUED.

qualified homesteaders, with preferential rights to file a homestead application upon lands settled upon and to perfect entry thereof when the surveys are extended, a settler's rights are superior to a prior lieu land selection, where the lieu land applicant failed to describe the lands by metes and bounds, with reference to natural monuments, so that the land could be identified. *Bird Timber Co. v. Snohomish County* 416

3. **SAME—LIEU LAND SELECTIONS—APPROVAL—CONFIRMATION—NECESSITY.** The approval of the commissioner of the general land office of lieu land selections does not confer any vested rights in the land, where the approval was not confirmed by the Secretary of the Interior, but the executive department had decided that the approval was without authority or jurisdiction, and included the lands within a forest reserve. *Bird Timber Co. v. Snohomish County*..... 416

PUBLIC POLICY:

Enforcement of guaranty agreement by bank, see **BANKS AND BANKING**.

PUBLIC SERVICE COMMISSION:

Finality of orders of, see **APPEAL AND ERROR**, 1.
Regulation of train service, see **RAILROADS**, 2-4.

PUBLIC USE:

Taking property for public use, see **EMINENT DOMAIN**.

QUESTION FOR JURY:

Proximate cause of accident, see **DEATH**.
Probable cause for making arrest, see **FALSE IMPRISONMENT**, 5.
In action for injury to servant, see **MASTER AND SERVANT**, 2, 5-7, 10, 11.
In action for injuries from collision with automobile, see **MUNICIPAL CORPORATIONS**, 29.
In civil actions, see **TRIAL**, 5.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.
Appropriation of property, see **EMINENT DOMAIN**.

1. **RAILROADS—RIGHT OF WAY—LOCATION OF ROAD—SUBSTANTIAL COMPLIANCE.** Where a deed granting a right of way for a railroad contained certain conditions relating to the location of the road across streams on the land, so as not to interfere with logging operations therein, and provided "that said right of way and the railroad and logging road thereon shall be placed as near as practicable to the hill so as not to injure the prairie land more than is necessary," but failed to further describe the hill or prairie land, construction of the road over a route selected by the grantee was a substantial compliance with the conditions of the deed, where the evidence showed that the road, though not constructed as near the

RAILROADS—CONTINUED.

hill as practicable, complied more nearly with other conditions of the deed as a feasible and practicable road, and it was shown that the grantor had visited the property while the road was being constructed and made no objection to the location. *Hansen v. Polson Logging Co.* 597

2. **SAME—INTERSTATE TRAINS—LOCAL SERVICE.** Although a railroad company operates only interstate trains, it may be required by the public service commission to render an adequate local service for the accommodation of the traveling public. *State ex rel. Great Northern R. Co. v. Public Service Commission*..... 275

3. **SAME—ADEQUACY OF TRAIN SERVICE—EVIDENCE—SUFFICIENCY.** A finding by the public service commission that train service furnished the town of K. was inadequate, and that a change of schedule would be to the advantage of the inhabitants thereof, is warranted by the evidence, where it was shown that there was a population of 1,500 people within a radius of nine miles, who, for the most part, transacted their business at K., that there were four jury terms of court at the county seat thirty miles west of K., and that the service ordered would best serve the convenience of those attending court, and would enable them to travel west to the county seat, or east to Spokane to transact business, and return the same day, that the passenger revenue at K. for the preceding year was \$4,311.65, and the revenue from freight over five times that amount; and the fact that compliance with the order might require an extra man, and that the train would be delayed from six to nine minutes, is not controlling upon the question of the adequacy of service. *State ex rel. Great Northern R. Co. v. Public Service Commission*..... 275

4. **RAILROADS—REGULATION—TRAIN SERVICE—ORDERS OF PUBLIC SERVICE COMMISSION—REVIEW.** The reasonableness and lawfulness of an order of the public service commission respecting train service to be rendered a town is reviewable under Rem. & Bal. Code, § 8629, and the presumption that the commission acted reasonably and lawfully must be clearly overthrown before the order will be set aside. *State ex rel. Great Northern R. Co. v. Public Service Commission.* 275

RAPE:

See **CRIMINAL LAW.**

RATIFICATION:

Of assignment of contract, see **ASSIGNMENTS**, 3.

REAL ESTATE AGENTS:

See **BROKERS.**

RECALL:

Of city councilman, see **MUNICIPAL CORPORATIONS**, 1, 2.

Of officers, see **OFFICERS.**

RECORDS:

On appeal, see **APPEAL AND ERROR**, 5-9.
Judicial notice of, see **EVIDENCE**, 1.

RECRIMINATION:

See **DIVORCE**, 2, 3.

REDUCTION:

Of debt by sale of mortgaged goods, see **CHATTEL MORTGAGES**.
Of rent, agreement for, see **LANDLORD AND TENANT**, 8, 9.

REGULATION:

Of train service by public service commission, see **RAILROADS**, 2-4.

REJECTION:

Of names from initiative petitions, see **STATUTES**, 2, 10-13.

RELIANCE:

Of purchaser on representations of vendor, see **FRAUD**, 3.

RELINQUISHMENT:

Of claim to water conduit by failure to make reservation in conveyance, see **WATERS AND WATER COURSES**, 4.

REMOVAL:

Of county seat, see **COUNTIES**, 1.
Exhumation of body for purpose of reburial, see **DEAD BODIES**.
Of buildings on leased premises, see **LANDLORD AND TENANT**, 5, 6.

RENT:

See **LANDLORD AND TENANT**, 2-5, 7-9.

REPAIRS:

By life tenant, see **LIFE ESTATES**, 2.

REPEAL:

Of statute, see **STATUTES**, 16-19.

REPLY:

See **PLEADING**, 4, 5.

REQUESTS:

Harmless error in refusal to give instructions, see **APPEAL AND ERROR**, 29.
For instructions, see **TRIAL**, 6, 7.

RESCISSION:

For fraud, see **EXCHANGE OF PROPERTY**.
Of contract of sale, see **SALES**, 4.
Of contract for sale of land, see **VENDOR AND PURCHASER**.

RES JUDICATA:

See JUDGMENT, 6, 7.

Judgment in action for separate maintenance as bar to action for divorce, see DIVORCE, 4, 5.

RETENTION:

Of proceeds by mortgagor on sales of goods, see CHATTEL MORTGAGES, 2.

RETIREMENT:

Of partner, liability for wages of employee, see PARTNERSHIP.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.

Conclusiveness of finding of council as to sufficiency of petition for improvement, see MUNICIPAL CORPORATIONS, 4, 5.

RIGHT OF WAY:

Of railroads, see RAILROADS, 1.

RIPARIAN RIGHTS:

See NAVIGABLE WATERS; WATERS AND WATER COURSES, 2.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 3, 5, 10.

ROADS:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 11, 21-30.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 2-4, 13.

SALES:

Permitting sales of goods mortgaged, see CHATTEL MORTGAGES.

Of corporate stock, see CORPORATIONS, 1-3.

Of diseased meat, see FOOD.

On foreclosure of mortgage, see MORTGAGES, 2, 3.

Of material to contractor on public improvement, see MUNICIPAL CORPORATIONS, 6, 8, 9.

Of realty, see VENDOR AND PURCHASER.

1. **SALES—OF GOODS—WHEN TITLE PASSES—BONA FIDE PURCHASERS.**
Where the agent of the consignor of lumber presented the bill of lading and invoice to the consignee and requested payment of ninety per cent of purchase price, according to the terms of sale, but left the papers in the consignee's office upon assurance that the invoice would

SALES—CONTINUED.

be checked up and the lumber paid for, the consignee, however, later refusing to pay or surrender the bill of lading, title to the lumber remained in the consignor, and although the consignee transferred the lumber to a *bona fide* purchaser for value and without notice. *Orilla Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.* 611

2. **SAME—TRANSFER OF TITLE—BILL OF LADING.** In such case, the fact that the consignee was also named in the bill of lading as consignor would not change the rule, since the presumption of ownership arising from a transfer of the bill of lading may be explained or rebutted by evidence showing the real ownership of the goods. *Orilla Lumber Co. v. Chicago, Milwaukee & Puget Sound R. Co.* 611
3. **SAME—BREACH OF WARRANTY—ACCEPTANCE—PRESUMPTIONS.** Failure to notify the vendor of defects in goods sold under a warranty, or offer to return them within a reasonable time after discovering the defects, raises a presumption that the goods received were of satisfactory quality. *Fink v. Marr*..... 92
4. **SALES — BREACH OF WARRANTY — WAIVER — ACCEPTANCE.** An acceptance of goods sold under a warranty as to quality is a waiver of the right to rescind, but does not waive the right to recover damages for breach of warranty in an action for the price. *Fink v. Marr* 92

SECRETARY OF STATE:

Submission to of initiative petitions, see **STATUTES**, 1-14.

SECURITY:

Provisions in note impairing security as affecting negotiability, see **BILLS AND NOTES**, 5.

SELECTION:

Of lieu lands, see **PUBLIC LANDS**.

Taxation of defective lieu land selections, see **TAXATION**.

SEPARATION:

Agreement between husband and wife, see **HUSBAND AND WIFE**, 4.

SERVICE:

Of abstract of record, time for, see **APPEAL AND ERROR**, 7.

Regulation of train service, see **RAILROADS**, 2-4.

SETTLEMENT:

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 3-6.

Of estate, see **LIFE ESTATES**.

SETTLERS:

Priority of rights over lieu land selections, see **PUBLIC LANDS**, 2.

SHERIFFS AND CONSTABLES:

Liability of community for wrongful levy made by sheriff, see HUSBAND AND WIFE, 1.

1. SHERIFFS AND CONSTABLES—PROTECTION OF PRISONERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that a sheriff was negligent in failing to prevent an assault on a prisoner by the inmates of a jail, where it appears that, soon after his commitment, he was brought before the Kangaroo court and fined by the judge thereof, which fine he refused to pay, whereupon he was beaten with a razor strop; it appearing that the sheriff, while having knowledge of the existence of the Kangaroo court and its rules, had no knowledge or good reason to believe that the prisoners contemplated an assault upon the plaintiff; and it was shown that Kangaroo courts were maintained in all jails and were considered an aid to the sheriff in keeping the prisoners clean and orderly; a sheriff being bound only to the exercise of reasonable and ordinary care in protecting a prisoner, in the absence of circumstances showing that he had reason to anticipate danger. *Riggs v. German*..... 128

SIGNATURES:

To petition for recall of officer, see MUNICIPAL CORPORATIONS, 1, 2.
On initiative petitions, see STATUTES, 1-14.

SOLVENCY:

Of improvement district, see MUNICIPAL CORPORATIONS, 34.

SPEED:

Experts as to rate of, see EVIDENCE, 9.

STARE DECISIS:

See COURTS, 1.
Constitutional construction relating to term of office of county commissioners as law of state, see COUNTIES, 2.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 9.
By proponents of recall, filing of, see OFFICERS.

STATES:

Accrual of action on contractor's bond given to state, see LIMITATION OF ACTIONS.
Right to maintain action to restrain diversion of waters of unnavigable lake, see WATERS AND WATER COURSES, 3.

STATUTES:

See **BASTARDS; DRAINS.**

Destruction of noxious weeds, see **AGRICULTURE.**

Arrest of party as absconding debtor, see **ARREST.**

Validity of statute providing for redetermination of question of benefits to land from maintenance of dikes, see **CONSTITUTIONAL LAW, 1.**

Term of office of county commissioners, see **COUNTIES, 2.**

Statute of frauds, see **FRAUDS, STATUTE OF.**

Entry of judgment on verdict, see **JUDGMENT, 3.**

Of limitation, see **LIMITATION OF ACTIONS.**

Furnishing timbers for use in mine, see **MASTER AND SERVANT, 4.**

Number of signatures to petition for recall of officers, see **MUNICIPAL CORPORATIONS, 1.**

Transfer of public funds, see **MUNICIPAL CORPORATIONS, 33.**

1. **STATUTES—INITIATION OF MEASURES—FRAUD AND CORRUPTION—ENFORCEMENT OF ACT—STATUTES—CONSTRUCTION.** The fact that 3 Rem. & Bal. Code, §§ 4971-31 and 4971-32, provide severe penalties for forgeries, fraud, false reports and certificates, and violations of the provisions of the law for initiation by petition of a measure to be submitted to the vote of the people, and that by Id., § 4971-5, provides for printing a warning of these provisions on every petition circulated, evidences an intent on the part of the legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, of this constitutional right of the people, except as provided for the review of decisions by executive officers. *State ex rel. Case v. Superior Court*..... 623
2. **SAME—"CANVASS"—LIMITATIONS—STATUTES—CONSTRUCTION.** Under 3 Rem. & Bal. Code, § 4971-15, providing that, upon submission of initiative petitions, the secretary of state shall "canvass" and count the names of certified legal voters, and if he finds the same name signed to more than one petition he shall reject both names from the count, the word "canvass," though meaning to "scrutinize, examine, and determine," does not authorize the secretary of state to do more than scrutinize and examine the petitions to determine the number of and reject the duplicate names, that being his only express authority; and the words "canvass and count" are given full effect without finding any intent to authorize the secretary of state to decide the genuineness of the signatures, the forgery of officer's initials, the sufficiency of the certifying officer's certificates, and like questions. *State ex rel. Case v. Superior Court*..... 623
3. **SAME—INITIATION OF MEASURES—DIRECTORY REQUIREMENTS—Use of INK.** The provisions of 3 Rem. & Bal. Code, § 4971-10, requiring a local certifying officer, in comparing and certifying the signatures on an initiative petition, to place his initials "in ink opposite the signatures of those persons shown by the registration books to be

STATUTES—CONTINUED.

- legal voters" is directory to the extent that initialing the signatures with a common lead pencil is a sufficient compliance with the law, in view of the liberal construction accorded election laws, the law not declaring a signature invalid for failure to use ink. *State ex rel. Case v. Superior Court*..... 623
4. SAME—REQUIREMENTS—FORM OF PETITION. For the same reasons, *Id.*, § 4971-9, prescribing the form of the petitions, in so far as it declares that petitions shall consist of sheets with numbered lines for not more than twenty signatures on each sheet, is directory, in so far as may be considered as limiting the number of signatures that may be placed on any petition. *State ex rel. Case v. Superior Court* 623
5. SAME—FORM OF PETITIONS—BLANK LINES—EVIDENCE OF FRAUD. The fact that the local certifying officer initialed blank lines on such a petition, upon which some names were signed, is not of itself such conclusive evidence of fraud on the part of the certifying officer as to authorize the rejection of the duly initialed signatures upon such a petition. *State ex rel. Case v. Superior Court*..... 623
6. SAME—DETERMINATION OF LOCAL OFFICERS—CONCLUSIVENESS. The finality of the determination of the local certifying officers is not affected by the fact that there is no special provision of law requiring such officers to return their certificate to the secretary of state. *State ex rel. Case v. Superior Court*..... 623
7. SAME. Such finality in nonregistration precincts is not affected by the fact that the officer is only required to certify as to his "belief" that his initialed signatures were those of qualified voters. *State ex rel. Case v. Superior Court*..... 623
8. STATUTES—INITIATION—PETITION—VALID SIGNATURES—DETERMINATION—REVIEW BY COURTS. The determination (under 3 Rem. & Bal. Code, § 4971-1 *et seq.*) of the number of valid signatures upon an initiative petition to submit a measure to a vote of the people, is a political rather than a judicial question, although including an issue of fraud, in the absence of statutory provisions to the contrary; hence the legislature has power to commit the same to administrative officers, and the courts could not, in the absence of express statute, review the determination of such officers. *State ex rel. Case v. Superior Court*..... 623
9. SAME—REVIEW BY CANVASSING OFFICERS—MINISTERIAL DUTIES. The determinations made by local officers upon questions expressly submitted to them by the law relating to the submission of initiative measures to a vote of the people cannot be reviewed by the secretary of state as a canvassing officer in the absence of express statutory authority therefor, since the duties of canvassing officers are purely ministerial and limited by the express power conferred upon local certifying officers. *State ex rel. Case v. Superior Court*..... 623

STATUTES—CONTINUED.

10. SAME—DETERMINATION OF VALID SIGNATURES—REVIEW—LIMITATIONS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-15, providing that, upon submission to him of initiative petitions, the secretary of state "shall proceed to canvass and count the names of certified legal voters on such petition. If he find the same name signed to more than one petition, he shall reject both names from the count," being a special authority to reject names for one reason only, suggests, almost conclusively, a limitation on his power to reject names for any other cause. *State ex rel. Case v. Superior Court* 623
11. SAME—DETERMINATION OF VALID SIGNATURES—POWERS OF SECRETARY OF STATE—LIMITATIONS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-12, providing that, upon an initiative petition being submitted to the secretary of state, he shall examine and file the same "if upon examination said petition appears to be in proper form and to bear the requisite number of signatures of legal voters," merely provides for a preliminary decision by the secretary as to the filing; and the fact that Id., § 4971-13 provides for a review of such preliminary decision in the courts, does not enlarge the scope of the review on an appeal from the secretary's final canvass of the signatures, so as to include in the latter review the question of the number of "signatures of legal voters," where, in the secretary's final canvass, he is only authorized to reject names if he finds the same name signed to more than one petition. *State ex rel. Case v. Superior Court* 623
12. SAME—DETERMINATION OF LEGAL SIGNATURES—APPEAL—NECESSITY—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. Where the secretary of state, upon his canvass of initiative petitions, rejects certain names, but accepts sufficient to put the measure on the ballot, so that his decision as a whole is in favor of the advocates of the measure, they may, on appeal by opponents of the measure, appear in the superior court in opposition to the claims of the opponents seeking reversal of the secretary's decision, without having taken an independent appeal within the five-day limit fixed by law. *State ex rel. Case v. Superior Court*..... 623
13. SAME—DETERMINATION OF VALID SIGNATURES—LOCAL OFFICERS—CONCLUSIVENESS—REVIEW BY SECRETARY OF STATE—STATUTES—CONSTRUCTION. The secretary of state is without authority, upon the canvass of initiative petitions, to inquire into or decide whether the names signed are the "signatures of legal voters," and when a local certifying officer has decided that names upon a petition are the signatures of legal voters, and has evidenced his decision by a proper certificate, his decision is final; in view of 3 Rem. & Bal. Code, § 4971-5, providing that the person in each precinct having possession of the registration books shall certify that he has carefully compared the signatures on the foregoing petitions with said regis-

STATUTES—CONTINUED.

tration books, and the signatures initialed by him are the signatures of legal voters of the state; and Id., § 4971-8, providing that in precincts where registration is not required, the petition shall be certified by a justice of the peace, road supervisor, member of a school board, or a postmaster, to the effect that he resides in the precinct, is acquainted with the legal voters thereof, and that he believes the signatures initialed by him are the signatures of legal voters of such precinct; and in view of the fact that the only authority for a review of the decisions of such local certifying officers is the provision in Id., § 4971-15, authorizing the secretary of state to canvass and count the names of certified legal voters, and "if he find the same name signed to more than one petition, he shall reject both names from the count." *State ex rel. Case v. Superior Court*..... 623

14. SAME—DETERMINATION OF LEGAL SIGNATURES—APPEAL—REVIEW BY COURTS—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-17, providing that any person dissatisfied with the determination by the secretary of state that an initiative petition does or does not contain the requisite number of signatures of legal voters, may have the same submitted to the superior court by citation or writ for examination and for a writ compelling certification of the measure, or for an injunction to prevent the same, as the case may be, to be heard and determined by the court, does not authorize the superior court to review the question as to requisite number of signatures of legal voters; since the appeal was to review only errors of the secretary of state and that question could not be determined by the secretary of state, the certificate of local certifying officers being conclusive on that subject on the courts as well as on the secretary of state. *State ex rel. Case v. Superior Court*..... 623

15. STATUTES—TITLE AND SUBJECTS—DIKING DISTRICTS. The title to the Laws of 1913, p. 267 (3 Rem. & Bal. Code, § 4107), "An act relating to dikes and drains, providing for assessments according to benefits, authorizing the incurring of obligations in cases of emergency, and validating certain warrants theretofore issued for such purposes, and amending certain sections of the code," is not invalid as embracing more than one subject; since the provision of the act authorizing the diking commissioners, in cases of emergency, to incur additional obligations and issue warrants in excess of their annual estimate of the cost of maintenance of the diking system, which warrants shall be valid and legal obligations of the district, and validating warrants theretofore issued, does not constitute an independent subject, but is all germane to the general title, and not in violation of Const., art. 2, § 19, providing that no bill shall embrace more than one subject, and that shall be expressed in its title. *State ex rel. Conner v. Superior Court*..... 480

16. STATUTES—TITLE AND SUBJECTS—REPEAL OF ACT. The title "an act creating a department of agriculture, providing for the organiza-

STATUTES—CONTINUED.

- tion and administration thereof, defining the powers and duties of its officers and employees in relation to agriculture . . . providing penalties for the violation thereof, and repealing certain acts and parts of acts," is sufficiently broad to include a provision of the act repealing Rem. & Bal. Code, § 3133, making it the duty of county commissioners to make a yearly levy to meet expenses for horticultural purposes. *Maxwell v. Lancaster*..... 602
17. STATUTES—TITLE AND SUBJECTS—REPEALING CLAUSE. It is not a valid objection that the title of an act is too general to cover a repealing clause; since the legislature may repeal existing laws as well as create new ones, under a title relating to a general subject. *Maxwell v. Lancaster*..... 602
18. STATUTES—REPEAL—CONFLICTING LAWS. The enactment of laws in conflict with existing laws works a repeal of the latter, though based upon a nonrelated subject. *Maxwell v. Lancaster*..... 602
19. STATUTES—REPEAL—INTENT OF LEGISLATURE—CONSTRUCTION. The enactment of 3 Rem. & Bal. Code, § 3000-1 *et seq.*, creating a department of agriculture and including therein the several departments of the state government having supervision over agricultural products, abolishing horticultural districts, and providing for the payment into the general fund of all fees and fines collected, and that the expense of maintaining the department shall be paid out of the general fund without regard to moneys that may be collected and paid therein from the administration of the department, shows an intent to repeal Rem. & Bal. Code, § 3133, providing for the levy of a tax by county commissioners for horticultural purposes. *Maxwell v. Lancaster* 602

STAY:

Pending other action, see ACTION.

STOCK:

Corporate stock, see CORPORATIONS, 1-6.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 2, 4-6.

Garnishment of to recover award paid in condemnation, see GARNISHMENT.

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS, 11, 21-30.

Apportionment of assessments against property for street paving, on final settlement of estate, see LIFE ESTATES, 5.

SUBMISSION:

To voters of proposition to remove county seat, see COUNTIES, 1.

Of initiative measure to vote of people, see STATUTES, 1-14.

SURPRISE:

As ground for continuance, see CONTINUANCE.

SURVEYS:

Selection of unsurveyed lieu lands, see PUBLIC LANDS.

TAXATION:

See DRAINS.

For cost of cutting noxious weeds, see AGRICULTURE.

Of costs, see COSTS, 1, 2.

Unpaid taxes as assets of city, see MUNICIPAL CORPORATIONS, 34.

Repeal of act providing for levy of tax for horticultural purposes, see STATUTES, 16, 19.

1. **TAXATION — PUBLIC LANDS — DEFECTIVE LIEU LAND SELECTIONS — VESTED RIGHTS.** Where lieu land selections of unsurveyed lands were defective because of an insufficient description and the approval of the selection was without authority or jurisdiction and conferred no vested rights in the lands, the same are not subject to taxation as the property of the applicants, and a tax lien thereon will be cancelled as a cloud upon the applicants' right to make lieu land selections under the forest reserve act, the lands having meanwhile been included in a public forest reserve. *Bird Timber Co. v. Snohomish County*..... 416

TENDER:

Of arbitration as condition precedent to action, see ARBITRATION AND AWARD.

Of performance by broker as assignee of co-employee, see ASSIGNMENTS, 2.

Of repayment of advance by mortgagee as condition precedent to action by pledgee of stock to cancel mortgage, see CORPORATIONS, 1.

Of interest by lessee with installment of rent, see LANDLORD AND TENANT, 3.

By lessee as defeating right of lessor to forfeit lease for nonpayment of rent, see LANDLORD AND TENANT, 4.

Necessity of tendering rent on election to extend lease, see LANDLORD AND TENANT, 7.

Of performance by vendee on breach of contract by vendors, see VENDOR AND PURCHASER, 3.

Of deed, see VENDOR AND PURCHASER, 5, 7.

TERM:

Of office of county commissioners, see COUNTIES, 2.

TERMINATION:

Of contract employing brokers to purchase land, see BROKERS, 2, 3.

Of lease by default in payment of rent, see LANDLORD AND TENANT, 4.

TIME:

- For filing appeal bond, see **APPEAL AND ERROR**, 2.
- For service of abstract of record, see **APPEAL AND ERROR**, 7.
- For performance of contract by brokers, see **BROKERS**, 5.
- For taxation of costs, see **COSTS**, 2.
- For entry of judgment, see **JUDGMENT**, 3.
- To exercise option to purchase premises, see **LANDLORD AND TENANT**, 2.
- For payment of rent, see **LANDLORD AND TENANT**, 7.
- Recitals in mortgage as affecting time for payment of note, see **MORTGAGES**, 1.
- For filing recall petitions, see **MUNICIPAL CORPORATIONS**, 2.
- For filing notice of lien against contractor's bond, see **MUNICIPAL CORPORATIONS**, 7.
- As essence of contract for sale of realty, see **VENDOR AND PURCHASER**, 4-7.

TITLE:

- By adverse possession, see **ADVERSE POSSESSION**.
- When passes on sale of goods, see **SALES**, 1, 2.
- Statutes, see **STATUTES**, 15-17.
- Of vendor, see **VENDOR AND PURCHASER**, 7.
- To beds of unnavigable lakes, see **WATERS AND WATER COURSES**, 1-3.

TORTS:

- See **ARREST**; **FALSE IMPRISONMENT**; **FRAUD**; **NUISANCE**.
- Measure of damages, see **DAMAGES**.
- Causing death, see **DEATH**.
- Sale of diseased meat, see **FOOD**.
- Of spouse, liability of community property for, see **HUSBAND AND WIFE**, 1, 2.
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TRANSCRIPTS:

- Of record for purpose of review, see **APPEAL AND ERROR**, 5-9.

TRESPASS:

- Restraining, see **INJUNCTION**.

TRIAL:

- See **NEW TRIAL**.
- Exceptions for purpose of review, see **APPEAL AND ERROR**, 5.
- Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 5-9.
- Review of verdicts, see **APPEAL AND ERROR**, 22-23.
- Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 24-29.
- Continuance of, see **CONTINUANCE**.

TRIAL—CONTINUED.

Instructions in action for false imprisonment, see FALSE IMPRISONMENT, 5-7.

Instructions in action for sale of diseased meat, see FOOD.

Right to trial by jury, see JURY.

Instructions in action for injury through collision with automobile, see MUNICIPAL CORPORATIONS, 21-23, 27, 28, 30.

Amendment of pleading at trial, see PLEADING, 6.

1. **TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE.** In an action against a sheriff for false imprisonment, a statement in the instructions that it was admitted in the case that the plaintiff did not commit the felony charged in the information upon which the warrant was issued, is not prejudicial as a comment on the facts, where there was no issue upon the trial whether the plaintiff was the person charged or not, the sole issue being whether the sheriff believed, or had reasonable grounds for believing, that plaintiff was the man, and it was clearly admitted upon the trial that plaintiff was not the man charged in the information, it not being error for the court to state an uncontroverted fact. *White v. Jansen*..... 435
2. **TRIAL—MISCONDUCT OF COUNSEL—SHOWING INDEMNITY INSURANCE.** In a personal injury case, the rule that the wanton intrusion of the fact that defendant carries liability insurance is such misconduct of counsel as to warrant reversal, does not override the rule that a party may cross-examine adverse witnesses touching every relation tending to show interest or bias. *Moy Quon v. Furuya Co.*..... 526
3. **TRIAL—DISMISSAL—WITH PREJUDICE.** Upon dismissing an action to foreclose a mechanics' lien for failure of the contractor to obtain the architect's certificate as required by the contract, or to plead or prove a demand therefor and a wrongful withholding by the architect, it is error for the court to enter judgment reciting ". . . and this action is hereby dismissed with prejudice," since the judgment is susceptible of being construed as a final adjudication of the right to compensation under the contract, regardless of the future ability of the contractor to obtain the certificate, or to make a showing of arbitrary or capricious refusal of the certificate by the architect. *Lindblom v. Mayor*..... 350
4. **TRIAL—NONSUIT—WAIVER OF MOTION.** A motion for nonsuit is waived where defendants did not stand upon their motion, but introduced further evidence. *Bouton-Perkins Lumber Co. v. Huston* 678
5. **TRIAL—PROVINCE OF COURT AND JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.** The fact that the testimony of a witness called by plaintiff is not in entire harmony with his theory of the case does not warrant the granting of a nonsuit, since it is the province of the jury to weigh and harmonize it, if possible, or accept or reject it, considering all the facts and circumstances of the case. *Lindquist v. Pacific Coast Coal Co.*..... 73

TRIAL—CONTINUED.

6. TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY. An omission of the court to adapt the instructions to a particular view of the case is not error, in the absence of a request therefor, Const., art. 4, § 16, providing that judges "shall declare the law," meaning that they shall declare the law applicable to the case in a general way. *Hiscock v. Phinney*..... 117
7. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions sufficiently covered by the instructions given. *Mickelson v. Fischer*..... 423
8. TRIAL—EXCESSIVE VERDICT—DUTY OF JUDGE. It is the duty of the trial judge to pass upon the amount of the verdict, on motion to reduce the same on the ground of excessiveness, instead of leaving the question to be decided by the supreme court. *Mickelson v. Fischer* 423
9. TRIAL—FINDINGS OF FACT—NECESSITY. In an action against lessees of land to foreclose a chattel mortgage upon crops, in which the owner of the land was made a party because of his claimed interest in the crops, on account of default of the lessees in failing to farm the land as provided in the lease, resulting in the production of a volunteer crop, a finding that title to the crop of grain was at all times in the owner of the land will be sustained, and it cannot be claimed that the finding is a mere conclusion and negated by other portions of the findings, in the absence of facts in the record affirmatively so showing, since findings are not necessary to support a decree in an equity suit. *Plough Hardware Co. v. Bruce*..... 431

TRUSTS:

Holding stock in trust as enabling parties to qualify as officers of corporation, see CORPORATIONS, 6.

Recovery of trust fund held by stockholders of corporation, see GARNISHMENT.

1. TRUSTS—IMPLIED TRUSTS—LIABILITY OF TRUSTEE. Where an award of \$25,000 for land condemned for a right of way was paid to a lumber company as owner of the land, and on appeal by claimants to the award the judgment was reversed in their favor and against the lumber company for the amount of the award, the company thereby became an involuntary trustee for the benefit of claimants to whom the money belonged. *Smith v. Gruber Lumber Co.* 111
2. TRUSTS—CONSTRUCTIVE TRUSTS—FRAUD IN ACQUISITION OF PROPERTY—PROBATE PROCEEDINGS. Where property was awarded to defendant as widow and sole heir of deceased, by a decree of distribution rendered upon due notice, conclusive and binding upon all parties, it cannot be claimed, more than one year thereafter, that defendant holds the property as involuntary trustee to the extent of an in-

TRUSTS—CONTINUED.

terest claimed by one alleged to be a sister and heir of deceased, on the ground of fraud perpetrated by defendant in procuring the decree; since the issue to be determined was defendant's right to take all of the property of deceased as his wife and sole heir, and is concluded by the judgment, in the absence of fraud extrinsic of the merits of the controversy. *Krohn v. Hirsch*..... 222

UNLIQUIDATED DEMANDS:

Allowance of interest on, see **INTEREST**.

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See **ATTACHMENT**, 2, 3; **JUDGMENT**, 5.

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Of separation and property agreement, for fraud, see **HUSBAND AND WIFE**, 4.

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Of property, as determining damages in condemnation proceedings, see **EMINENT DOMAIN**, 1.

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Between pleading and proof in civil action, see **PLEADING**, 7.

VENDOR AND PURCHASER:

Sale or purchase of land by brokers, see **BROKERS**.

Rescission for fraud inducing contract, see **EXCHANGE OF PROPERTY**.

Fraud inducing sale or purchase of land, see **FRAUD**, 1-5, 7.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

Transfer of ownership of personal property, see **SALES**.

Implied grant of easement in water conduit on conveyance of lands, see **WATERS AND WATER COURSES**, 4.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD.** A vendee is entitled to rescind a contract for the purchase of real property on the ground of the vendor's fraud in representing that he had title to the land, that it was practically level, that he had installed a pumping plant sufficient to properly irrigate the land, and that a society had been formed by persons purchasing land from him for the purpose of protecting any purchaser in event of his inability to make payments as provided in his contract, where the record amply sustains the court's findings that the representations were false and the inducing cause of the contract, and clearly sufficient to rescind the contract. *Price v. Wenatchee Valley Orchards Co.* 83
2. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—LACHES.** The right to rescind must be promptly exercised and will not be

VENDOR AND PURCHASER—CONTINUED.

- granted to vendees, where the parties had ample time to inspect the land, did so inspect it, treated it as their own, and later offered it for sale without notice to the vendors of any dissatisfaction, and delayed four months longer before bringing suit to rescind. *Pearson v. Gullans* 57
3. SAME—RESCISSION BY VENDEE—TENDER—NECESSITY—RECOVERY OF PAYMENTS. Vendors in contracts of sale, who withdrew the contracts from escrow without right, and while they were in no position to have performed the contracts themselves, cannot complain that the vendee accepted such acts as a rescission on their part and claimed a right to a return of the money paid; and the vendee is not bound to a tender of performance on his part. *Gibson v. Rouse* 102
4. VENDOR AND PURCHASER—CONTRACT—FORFEITURE—DEFAULT IN PAYMENT—WAIVER. Where contracts for the sale of property declared the time of payment of their essence, and provided that the vendors might declare the contracts forfeited and retain payments made, upon failure of the purchaser to make deferred payments promptly, conversations on the part of one of the vendors leading the purchaser to believe that prompt payment of balances due would not be insisted upon, and the execution of mortgages upon the property not falling due until long after maturity of the deferred payments, constitutes a waiver of the vendors' right to a forfeiture without notice and tender of performance. *Gibson v. Rouse*..... 102
5. SAME—FORFEITURE—TENDER OF DEED—NECESSITY. In such case, the vendors, having waived the provision making time of payment the essence of the contracts, cannot thereafter claim a forfeiture and put the vendee in default without first tendering a deed and demanding payment of the purchase price. *Gibson v. Rouse*.... 102
6. SAME—NOTICE OF FORFEITURE—EVIDENCE—SUFFICIENCY. Whether the vendors ever gave notice of an intention to forfeit the contracts after waiver of the provision making time of payment the essence thereof, is not sufficiently shown by their testimony that they wrote letters to the vendee demanding payment and notifying her that, in default thereof, the contracts would be forfeited, the vendee having denied receipt of the letters. *Gibson v. Rouse*..... 102
7. SAME—FORFEITURE—TENDER OF CONVEYANCE—INABILITY TO CONVEY TITLE. Where vendors waived provisions in contracts for the sale of land declaring time the essence thereof, but made no tender of a deed and were not in position to convey a clear title, owing to their execution of mortgages on the land pending maturity of the contracts, they cannot put the vendee in default, while the mortgages remain unpaid, by demanding payment and threatening forfeiture of the contracts. *Gibson v. Rouse*..... 102

VERDICT:

- Review on appeal, see **APPEAL AND ERROR**, 22, 23.
- Inadequate or excessive damages, see **DAMAGES**.
- Judgment notwithstanding verdict, see **JUDGMENT**, 1, 2.
- Duty of judge to pass upon amount of verdict, on motion to reduce, see **TRIAL**, 8.

VESTED INTEREST:

- Of broker in property, created by contract of employment, see **BROKERS**, 6.

VESTED RIGHTS:

- Redetermination of question of benefits from dikes as disturbance of vested rights, see **CONSTITUTIONAL LAW**, 1.
- Of applicants in lieu land selections, right to tax, see **TAXATION**.

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- See **MASTER AND SERVANT**, 9.

VOTERS:

- Submission to of proposition to remove county seat, see **COUNTIES**, 1.
- Signatures of to recall petitions, see **MUNICIPAL CORPORATIONS**, 1.

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- Error waived in appellate court, see **APPEAL AND ERROR**, 11-13.
- Of necessity of seeking redress through corporation before bringing suit, see **CORPORATIONS**, 5.
- Of provisions of contract requiring architect's certificate of completion of building, see **CONTRACTS**, 6.
- Of right to plead former acquittal, by granting motion for dismissal at close of state's case, see **CRIMINAL LAW**, 2.
- Of right to rescind contract for fraud, see **EXCHANGE OF PROPERTY**.
- Of rights of life tenant, as executor, on payment of debts and expenses of estate from income, see **EXECUTORS AND ADMINISTRATORS**, 6.
- Notice and proof of loss insured against, see **INSURANCE**, 1, 3.
- Of defects in engineer's report on proposed improvement, see **MUNICIPAL CORPORATIONS**, 17.
- Of objection to defects in notice of hearing on assessment roll, see **MUNICIPAL CORPORATIONS**, 18.
- Of rights under contract by acceptance of goods, see **SALES**, 4.
- Of motion for nonsuit, see **TRIAL**, 4.
- Of right to rescind contract, see **VENDOR AND PURCHASER**, 2.
- Of right to forfeit contract, see **VENDOR AND PURCHASER**, 4.

WARRANTS:

Orders for payment from public funds, see **MUNICIPAL CORPORATIONS**, 37.

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WATERS AND WATER COURSES:

See **DRAINS**; **NAVIGABLE WATERS**.

Finality of order of public service commission upon hearing upon complaint against water company, see **APPEAL AND ERROR**, 1.

1. **WATERS AND WATER COURSES—UNNAVIGABLE LAKES—TITLE TO BEDS.** Title to the beds of unnavigable lakes is not, and never has been, in the state, in view of the construction, as applied in prior decisions of Rem. & Bal. Code, § 143, declaring the common law to be the rule of decision in the courts of this state, so far as not inconsistent with the constitution and laws thereof, and of the United States, and the enabling act, 25 Stat. at L. p. 681, which in specifying the lands which shall pass to the state upon its admission into the Union, not including, expressly or by implication, unnavigable lakes, but providing "that the state shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act," the state recognizing the conditions therein by its disclaimer, in Const., art. 26, of all right and title to the unappropriated public lands within the boundaries of the state, upon its admission to the Union. *Bernot v. Morrison*..... 538
2. **WATERS AND WATER COURSES—UNNAVIGABLE LAKES—TITLE TO BEDS.** The common law (Rem. & Bal. Code, § 143), being the rule of decision in the state as affecting unnavigable waters in streams and lakes, title to the bed of an unnavigable lake is in the patentees of lands bordering thereon, the declaration in Const., art. 21, § 1, that "the use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use," never being intended to destroy riparian rights in unnavigable waters; and Laws 1890, p. 706, relating to appropriation of waters for irrigation, and the act of Congress of March 3, 1877, relating to the reclamation of desert lands and the use of water thereon by prior appropriation, containing nothing therein abrogating the common law rule touching littoral and riparian rights in unnavigable waters. *Bernot v. Morrison* 538
3. **WATERS AND WATER COURSES—UNNAVIGABLE LAKES—DIVERSION—ACTIONS—RIGHTS OF STATE.** Although the state holds no title to the bed of unnavigable lakes, it has, by reason of its sovereignty, as between itself and the United States, an interest sufficient to maintain an action against an intruder without title. *Bernot v. Morrison* 538

WATERS AND WATER COURSES—CONTINUED.

4. **WATERS AND WATER COURSES—EASEMENTS—WATER CONDUIT—CONSTRUCTION BY LESSEE OR DISSEISOR—SEPARATION OF ESTATE.** Where a father and son disagreed as to the ownership of a half section of land, occupied by the son as lessee or disseisor, and litigation ensued, but before trial a compromise agreement was made whereby the son was conveyed thirty acres of the land on which the house, barn and orchard were located, reserving to the son the right to purchase any additional part of the land at its market value, but failing to make reservation with reference to a conduit which the son had constructed to convey water from a spring located on the property retained by the father to the dwelling house and other buildings belonging to the son, the conveyance of the thirty acres did not operate as an implied grant of an easement in the use of the conduit, but failure to make reservation in the settlement agreement, with reference to the conduit and the water, operated as a relinquishment of any claim to the enjoyment thereof. *Cogswell v. Cogswell* 315

WEEDS:

Destruction of noxious weeds, see **AGRICULTURE**.

WITHDRAWAL:

Of bids before acceptance, see **CONTRACTS**, 2.

WITNESSES:

See **DEPOSITIONS**.

Absence of, as ground for continuance, see **CONTINUANCE**, 1.

Fees as costs, see **COSTS**, 1, 2.

Experts, see **EVIDENCE**, 8, 9.

Examination of witness as to fact of indemnity insurance, see **TRIAL**, 2.

1. **WITNESSES—CROSS-EXAMINATION—CREDIBILITY — INTEREST OR BIAS.** In an action for personal injuries, it is not error, on cross-examination of a witness for defendant, to question him touching his connection as agent for an indemnity company with which defendant carried liability insurance, as showing interest or bias affecting his credibility. *Moy Quon v. Furuya Co.*..... 526

WORK AND LABOR:

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See **ATTACHMENT; CERTIORARI; INJUNCTION; MANDAMUS**.

